

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA		DOCKET NO. 4:08CR224
		JUNE 30, 2010
VS.		9:07 A.M.
DAVID A. VOGEL		BEAUMONT, TEXAS

VOLUME 8 OF 8, PAGES 1687 THROUGH 1858

REPORTER'S TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE MARCIA A. CRONE,
UNITED STATES DISTRICT JUDGE, AND A JURY

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6 PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE;
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TABLE OF CONTENTSPAGE

COURT'S INSTRUCTIONS TO THE JURY	1703
CLOSING ARGUMENT BY THE GOVERNMENT (MR. COLLINS)	1755
CLOSING ARGUMENT BY THE DEFENDANT (MR. BRETT SMITH)	1780
CLOSING ARGUMENT BY THE DEFENDANT (MR. SCOTT SMITH)	1792
REBUTTAL ARGUMENT BY THE GOVERNMENT (MS. SMITH)	1812
JURY NOTE	1821
VERDICT	1824
FORFEITURE PROCEEDING:	
COURT'S SUPPLEMENTAL INSTRUCTIONS	1829
ARGUMENT BY THE GOVERNMENT (MR. COLLINS)	1841
ARGUMENT BY THE DEFENDANT (MR. BRETT SMITH)	1847
JURY NOTE	1849
VERDICT	1851

INDEX OF EXHIBITS

GOVERNMENT'S EXHIBIT 210	1827
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1 (Open court, defendant present, jury not
2 present, 9:07 a.m.)

3 THE COURT: All right. She is handing out
4 copies of the charge, based on our discussions this last
5 evening; and I want to know if there are any objections
6 to the charge. Now is the time to put them on the
7 record.

8 MR. BUYS: Yes, your Honor. As discussed
9 previously with the court and counsel in chambers, the
10 government, for the reasons stated in the government's
11 objections to Mr. Vogel's proposed special jury
12 instruction, Docket Nos. 287 and 289, the government
13 believes that *United States versus Santos* does not apply
14 to this case and that "proceeds" should not be defined to
15 require any degree of profits. The official position of
16 the United States Department of Justice is that
17 "proceeds" means "gross receipts" unless the SUA pertains
18 to the payment of the expense of an illegal gambling
19 operation under 18, United States Code, 1955. Since no
20 such violation is charged in this case, the government
21 believes that a *Santos* profits instruction is
22 inapplicable.

23 THE COURT: Do you want to respond to that?

24 MR. SCOTT SMITH: Well, we, of course, believe
25 that the *Santos* instruction is appropriate and that the

1 court has got it correctly when it stated that "proceeds"
2 means "profits" because that's what *Santos* says; and any
3 instruction that does not include that, we would object
4 to.

5 THE COURT: All right. That objection is
6 overruled. I think the *Santos* decision is broader than
7 the government reads. And looking at the Fifth Circuit
8 cases, they looked at things and saying, "Well, there
9 wasn't plain error"; but they're not saying it wasn't
10 error. They just didn't find it to be plain error
11 because at that time *Santos* hadn't been announced.

12 At this time it has been announced, and the
13 court feels obligated to follow the Supreme Court's
14 direction in defining "proceeds" as "profits" in the
15 context of a money laundering statute. It's the same
16 statute, the money laundering statute, as is involved in
17 *Santos*. So, I feel that that's appropriate. So, it's
18 overruled.

19 MR. SCOTT SMITH: From the defense, your
20 Honor, we believe that since Mr. Vogel was indicted in
21 the conjunctive, outside the usual course of professional
22 practice and not for a legitimate medical --

23 THE COURT: Wait a moment. I have a case. I
24 have to go get that.

25 MR. SCOTT SMITH: Okay.

1 (Recess, 9:09 a.m. to 9:10 a.m.)

2 THE COURT: Okay. Go ahead.

3 MR. SCOTT SMITH: We believe that since he was
4 indicted in the conjunctive, it should be -- the charge
5 should also be in the conjunctive. That is our objection
6 to the offenses charged and the description of the
7 substantive count relating to the Controlled Substances
8 Act.

9 THE COURT: Well, that's overruled because
10 Fifth Circuit authority is clear that a disjunctive
11 statute may be pleaded in the conjunctive and proved in
12 the disjunctive. That's been well recognized for
13 decades. One example is *United States versus Fagan*,
14 4 F.3rd 991, Fifth Circuit, 1993. Also, there's *United*
15 *States versus Haymes*, 610 F.2d 309; and that is Fifth
16 Circuit, 1980. That's without merit.

17 MR. SCOTT SMITH: May I continue?

18 THE COURT: Yes.

19 MR. SCOTT SMITH: We also object to what was
20 on page 15 of the draft, what we were referring to as the
21 "*Rothenberg* instruction." As you know, the *Rothenberg*
22 case out of the Fifth Circuit instructs the district
23 courts to be careful to advise the jury so that they
24 don't confuse civil standards with criminal standards.

25 And we believe the *Rothenberg* instruction as

1 we submit it should state as follows: If it is shown
2 that a physician or a pharmacist has violated a rule or
3 regulation of the Texas Board of Medical Examiners or
4 Pharmacy Examiners or if the medical professional's
5 conduct is shown to have differed from that of other
6 medical professionals under a like or similar
7 circumstances, such does not necessarily establish that
8 he or she issued prescriptions outside of professional
9 medical practice or not for a legitimate medical purpose.

10 The instruction that is in this charge is
11 different from what we were requesting and it also uses
12 the term "co-conspirators" and we believe the term
13 "co-conspirators" is suggestive that everybody associated
14 with the Madison Pain Clinic is, in fact, a
15 co-conspirator, when, in fact, we don't believe they are.

16 THE COURT: Does the government want to
17 respond to that one?

18 MR. BUYS: Yes, your Honor. The government
19 disagrees that the *Rothenberg* instruction is applicable
20 in this case. That was not a case involving a CSA
21 violation such as this case. That case involved a
22 doctor. The limiting instruction in that case was given
23 in a completely different context, where the doctor was
24 being charged with a non-drug violation. And the civil
25 Texas statutes that were used in that case were being

1 used for a different purpose, completely unrelated to
2 their use in this case, which goes directly to the
3 standard of care that's applicable to the ultimate
4 decision by the jury. For that reason, we feel that
5 *Rothenberg* does not apply appropriately in this context
6 and would concur with the court's instruction of the
7 limiting instruction here.

8 THE COURT: Well, the court has given a
9 limiting instruction to address some of those concerns.
10 Obviously here the defendant is not a physician; so, it
11 has to be tailored somewhat.

12 Also, the other people are called "alleged
13 co-conspirators," not "co-conspirators." But the court
14 believes that the instruction as stated, which reads:
15 You cannot find the defendant guilty of the charged drug
16 conspiracy solely on the ground that his acts or the acts
17 of alleged co-conspirators violate Texas laws,
18 regulations, or rules governing the practice of medicine
19 or the practice of pharmacy unless you also believe that
20 those acts violate the federal drug laws; namely, that
21 the defendant conspired to distribute hydrocodone outside
22 the usual course of professional practice or not for a
23 legitimate medical purpose.

24 I believe that that's sufficient limiting
25 instruction to accomplish what was set forth in

1 *Rothenberg*. So, the objection is overruled.

2 MR. SCOTT SMITH: Your Honor, additionally, we
3 requested that the court submit definitions taken from
4 21 USC, Sections 802(21), (2), (10), and (11) referring
5 to "practitioner," "administer," "dispense," and
6 "distribute," which I don't believe are contained within
7 the court's charge. We think that would assist the jury
8 in understanding the various roles played in this case.

9 MR. BUYS: Your Honor, the government would
10 disagree with that objection. Those are commonly known
11 terms. They've been defined throughout the trial I think
12 by the experts. To the extent that they are in need of
13 any definition, the court rarely, if ever, provides
14 definitions in a drug case of those types of definitions;
15 and we don't think they're necessary here.

16 THE COURT: I find no need for that. I think
17 the jury can understand what that means. I think there's
18 testimony that clearly defines what that's about, and
19 clearly in your closing arguments you can discuss that.

20 MR. SCOTT SMITH: Overruled?

21 THE COURT: Overruled.

22 MR. SCOTT SMITH: Your Honor, we also
23 requested a judicial notice and that the jury be
24 instructed on the differing drug schedules. There's been
25 testimony in this case about Schedule II substances and

1 Schedule III substances. We believe it would assist the
2 jury to have an instruction as we submitted in our
3 Document No. 266 relating to drug schedules.

4 THE COURT: I think there's been testimony
5 about drug schedules. Here the jury is instructed that
6 hydrocodone is a Schedule III controlled substance.
7 That's the only substance we're really discussing. So, I
8 don't see the need to complicate the instructions with
9 reference to other schedules that are not applicable in
10 this instance.

11 I don't know if the government has any further
12 comment on that.

13 MR. BUYS: No.

14 THE COURT: That's overruled.

15 MR. SCOTT SMITH: Your Honor, we also think --
16 and this is quite critical to us -- that the jury needs
17 to be instructed about a doctor's good faith. We've
18 addressed with the government and agreed to the reference
19 to the attorney's good faith, but we didn't talk about
20 the doctor's good faith. And we requested an
21 instruction, on page 3 of our proposed instructions,
22 relating to a doctor's good faith based upon *United*
23 *States versus Moore*, the Supreme Court authority. And we
24 believe that it is important for the jury to understand
25 that if a doctor makes a mistake, it doesn't necessarily

1 mean it's a crime.

2 MR. BUYS: The government opposes that
3 request, your Honor. There are no doctors on trial in
4 this case. I think that would just simply confuse the
5 jury.

6 THE COURT: I agree. That's overruled.

7 MR. SCOTT SMITH: Your Honor, we additionally
8 requested, on page 3 of Document No. 266, an instruction
9 that there is no national consensus on the treatment of
10 chronic pain management, based upon *Armstrong*, the
11 district court opinion, and *Skinner*, a Fifth Circuit --
12 excuse me; I'm sorry -- a Federal Register opinion.

13 MR. BUYS: And, your Honor, the government
14 would oppose that request. I think the evidence has come
15 in this case through experts that there is a general
16 standard applicable to physicians across the nation, a
17 general standard of care. *Armstrong* does not stand for
18 the proposition that there is no such thing as a national
19 standard.

20 THE COURT: I agree. The court did not give
21 such an instruction. That's overruled.

22 MR. SCOTT SMITH: Your Honor, again, I --
23 excuse me. We also request an instruction relating to
24 the Ryan Haight Act, as described on page 5 of
25 Document 266. We believe there has been testimony --

1 there are certainly documents that have been admitted
2 referring to compliance with the Ryan Haight Act. While
3 I certainly understand the court's concern that it was
4 not enacted until after this conspiracy was alleged to
5 have closed, I think it's important for the jury to know
6 that fact, that it was not the law, since it's been
7 referred to here in their presence.

8 THE COURT: Does the government have a
9 response?

10 MR. BUYS: The government would oppose that
11 request as well, your Honor. The Ryan Haight Act is --
12 it was not law. It's not retroactive. It would confuse
13 the jury. The law that is applicable in this case, which
14 is that a -- that a prescription, to be valid, must be
15 issued within the usual course of professional practice
16 and not -- for a legitimate medical purpose has been the
17 law for decades.

18 THE COURT: I think there was testimony that
19 the Ryan Haight Act did not pass until later. That's in
20 the record. I see no need to state what the Ryan Haight
21 Act is because it didn't apply at the time of this
22 incident. So, I find it irrelevant. That's overruled.

23 MR. SCOTT SMITH: Your Honor, we also
24 requested on page 6 of our proposed instructions an
25 instruction on venue and the government's responsibility

1 to prove up venue in this case. That's certainly a fact
2 finding the jury must make, and it's not in this charge.
3 We request that it be included.

4 MR. BUYS: Your Honor, Fifth Circuit authority
5 is clear on this point that there's no instruction
6 necessary when venue is not at issue, as it is not in
7 this case.

8 THE COURT: Venue is not at issue. The court
9 has already ruled on that matter. There are clearly acts
10 committed by various co-conspirators in the Eastern
11 District of Texas, and venue is appropriate in this
12 district.

13 MR. SCOTT SMITH: With respect to the 21 USC,
14 841, your Honor, we believe the court needs to
15 additionally define "usual course" -- or the term
16 "professional practice." We've given the court a
17 proposed instruction from the *United States versus*
18 *Feingold* case, 454 F.3rd 1001, on pages 7 and 8 of our
19 proposed instructions.

20 We believe that the jury should be instructed
21 that the term "professional practice" means "at least
22 there exists a reputable group of people in the medical
23 profession who agree that a given approach of prescribing
24 controlled substances is consistent with legitimate
25 medical treatment and in making medical judgment

1 concerning the right treatment for an individual patient.
2 Physicians have discretion to choose among a wide range
3 of available options. Therefore, in determining whether
4 physicians acted without a legitimate medical purpose,
5 you should examine all the physician's actions and
6 circumstances surrounding them."

7 THE COURT: Response on that?

8 MR. BUYS: Yes, your Honor. For the reasons
9 stated in the government's objections to the special
10 requested instructions by Mr. Vogel, the government
11 opposes that request. The court has adopted, after a
12 considerable discussion among counsel, an instruction
13 that covers a definition of "usual course of professional
14 practice and legitimate medical purpose" and that is
15 adequately covered already within the court's charge.

16 THE COURT: The court agrees. That objection
17 is overruled.

18 MR. SCOTT SMITH: Similarly, your Honor, we
19 would request that the court instruct the jury consistent
20 with *United States versus Armstrong*, Fifth Circuit,
21 550 F.3d at 382, that a -- the instruction from that case
22 be given to the jury on what "usual course of medical
23 practice" is.

24 THE COURT: Does the government have a
25 response on that one?

1 MR. BUYS: The government would object to that
2 request unless the court wants to also include the
3 laundry list of other factors that cases such as *Fuchs*
4 have held that show that conduct is outside the usual
5 course of professional practice and not for a legitimate
6 medical purpose.

7 THE COURT: The court finds that instruction
8 not necessary. It would be confusing. It would be
9 adding to -- it would be required to add even more
10 information to a charge that's already 40 pages long, and
11 the court is not going to do that. The objection is
12 overruled.

13 MR. SCOTT SMITH: May I have one second, your
14 Honor?

15 THE COURT: Yes.

16 MR. SCOTT SMITH: That concludes the defense
17 objections.

18 THE COURT: All right.

19 MR. BUYS: There are no other objections with
20 respect to the jury charge by the government, your Honor.
21 The government had a motion to withdraw certain exhibits.
22 Would the court like to hear that now?

23 THE COURT: Yes.

24 MR. BUYS: Okay. There are a number of
25 exhibits, your Honor, that the government did not use or

1 submit and has no intention of going back to the jury.
2 That would include Government's Exhibit 14 and 14a. It's
3 a transcript and audio recording of a telephone call.

4 There are voluminous records, bank records,
5 set out -- identified as Government's Exhibits 160
6 through 170.

7 And the government would move, as well, to
8 substitute photos of drug evidence that are set out in
9 Government's Exhibits 2, 3, 5 through 10, 138, and 146,
10 and any others that I may have failed to mention. I
11 believe that's all of them.

12 THE COURT: Any objection to that?

13 MR. SCOTT SMITH: No, your Honor.

14 THE COURT: All right. That's granted.

15 MR. SCOTT SMITH: Your Honor, at this time the
16 defense would re-urge its Rule 29 motion to dismiss on
17 the insufficiency of evidence and on the basis that the
18 statute as applied to Mr. Vogel is vague and unclear.

19 THE COURT: It's denied for the reasons stated
20 previously.

21 Okay. Are we ready to have the jury?

22 MR. BUYS: I believe we're ready, your Honor.

23 THE COURT: Okay. Let's get the jury, and
24 I'll read the charge.

25 MR. SCOTT SMITH: There were two defense

1 exhibits that were not used.

2 THE COURT: Oh, okay. Go ahead.

3 MR. SCOTT SMITH: That was Exhibit 59, which
4 was a recording, and Exhibit 39, which was a recording.
5 We would ask the court to withdraw those at this time.

6 THE COURT: Any objection?

7 MR. BUYS: No, your Honor. I just wondered if
8 there were transcripts associated with those at all.

9 MR. SCOTT SMITH: No.

10 MR. BUYS: Okay. No objection.

11 THE COURT: All right. That's granted.

12 Anything else? Because I'm going to read the
13 charge, and then we'll do the closing arguments.

14 Have you told Ms. Leger the time that you're
15 going to use and how you're going to divide it up and
16 everything?

17 MR. COLLINS: Yes.

18 THE COURT: Okay. Let's get the jury.

19 (Jury enters courtroom, 9:25 a.m.)

20 THE COURT: These are the court's instructions
21 to the jury. You can read along with the copy that you
22 have been provided. The official copy is the copy that's
23 on bond paper; and that's what you'll ultimately have and
24 your foreperson will have, along with the verdict form
25 that's also on bond paper. That's the one that needs to

1 be filled out. But you can read along as I read.

2 Court's instructions to the jury. Members of
3 the jury, now that you have heard all the evidence in the
4 case, it becomes my duty to give you the instructions of
5 the court as to the law applicable to this case.

6 In any jury trial there are, in effect, two
7 judges. I am one of the judges; the other is the jury.
8 It is my duty to preside over the trial and to decide
9 what testimony and evidence is proper for your
10 consideration. It is also my duty at the end of the
11 trial to explain to you the rules of law that you must
12 follow and apply in arriving at your verdict.

13 First, I will give you some general
14 instructions which apply in every case. For example,
15 instructions about burden of proof and how to judge the
16 believability of witnesses. Then I will give you some
17 specific rules of law about this particular case. And,
18 finally, I will explain to you the procedures you should
19 follow in your deliberations.

20 Duty to follow instructions. You as jurors
21 are the judges of the facts. But in determining what
22 actually happened -- that is, in reaching your decision
23 as to the facts -- it is your sworn duty to follow all
24 the rules of law as I explain them to you.

25 You have no right to disregard or give special

1 attention to any one instruction or to question the
2 wisdom or correctness of any rule I may state to you.
3 You must not substitute or follow your own notion or
4 opinion as to what the law is or ought to be. It is your
5 duty to apply the law as I explain it to you, regardless
6 of the consequences.

7 It is also your duty to base your verdict
8 solely upon the evidence, without prejudice or sympathy.
9 That was the promise you made and the oath you took
10 before being accepted by the parties as jurors, and they
11 have the right to expect nothing less.

12 Presumption of innocence, burden of proof,
13 reasonable doubt. The first superseding indictment or
14 formal charge against the defendant is not evidence of
15 guilt. Indeed, the defendant is presumed by the law to
16 be innocent. The law does not require the defendant to
17 prove his innocence or produce any evidence at all, and
18 no inference whatever may be drawn from the election of
19 the defendant not to testify. The government has the
20 burden of proving the defendant guilty beyond a
21 reasonable doubt; and if it fails to do so, you must
22 acquit the defendant.

23 While the government's burden of proof is a
24 strict or heavy burden, it is not necessary that the
25 defendant's guilt be proved beyond all possible doubt.

1 It is only required that the government's proof exclude
2 any reasonable doubt concerning the defendant's guilt.

3 A reasonable doubt is a doubt based upon
4 reason and common sense after careful and impartial
5 consideration of all the evidence in the case. Proof
6 beyond a reasonable doubt, therefore, is proof of such a
7 convincing character that you would be willing to rely
8 and act upon it without hesitation in the most important
9 of your own affairs.

10 Evidence, excluding what is not evidence. As
11 I told you earlier, it is your duty to determine the
12 facts. In doing so, you must consider only the evidence
13 presented during the trial, including the sworn testimony
14 of the witnesses and the exhibits. Remember that any
15 statements, objections, or arguments made by the lawyers
16 are not evidence. The function of the lawyers is to
17 point out those things that are most significant or most
18 helpful to their side of the case and in so doing to call
19 your attention to certain facts or inferences that might
20 otherwise escape your notice. In the final analysis,
21 however, it is your own recollection and interpretation
22 of the evidence that controls in the case. What the
23 lawyers say is not binding upon you.

24 During the trial I sustained objections to
25 certain questions and exhibits. You must disregard those

1 questions and exhibits entirely. Do not speculate as to
2 what the witness would have said if permitted to answer
3 the question or as to the contents of an exhibit. Your
4 verdict must be based solely on the legally admissible
5 evidence and testimony.

6 Also, do not assume from anything I may have
7 done or said during the trial that I have any opinion
8 concerning any of the issues in this case. Except for
9 the instructions to you on the law, you should disregard
10 anything I may have said during the trial in arriving at
11 your own findings as to the facts.

12 Evidence, inferences, direct and
13 circumstantial. While you should consider only the
14 evidence, you are permitted to draw such reasonable
15 inferences from the testimony and exhibits as you feel
16 are justified in the light of common experience. In
17 other words, you may make deductions and reach
18 conclusions that reason and common sense lead you to draw
19 from the facts which have been established by the
20 evidence.

21 In considering the evidence, you should not be
22 concerned about whether the evidence is direct or
23 circumstantial. Direct evidence is the testimony of one
24 who asserts actual knowledge of a fact, such as an
25 eyewitness. Circumstantial evidence is proof of a chain

1 of events and circumstances indicating that something is
2 or is not a fact. The law makes no distinction between
3 the weight you may give to either direct or
4 circumstantial evidence.

5 Credibility of witnesses. I remind you that
6 it is your job to decide whether the government has
7 proved the guilt of the defendant beyond a reasonable
8 doubt. In doing so, you must consider all of the
9 evidence. This does not mean, however, that you must
10 accept all of the evidence as true or accurate.

11 You are the sole judges of the credibility or
12 believability of each witness and the weight to be given
13 the witness' testimony. An important part of your job
14 will be making judgments about the testimony of the
15 witnesses who testified in this case. You should decide
16 whether you believe all or any part of what each person
17 had to say and how important that testimony was. In
18 making that decision, I suggest that you ask yourself a
19 few questions: Did the person impress you as honest?
20 Did the witness have any particular reason not to tell
21 the truth? Did the witness have a personal interest in
22 the outcome of the case? Did the witness have any
23 relationship with either the government or the defense?
24 Did the witness seem to have a good memory? Did the
25 witness clearly see or hear the things about which he or

1 she testified? Did the witness have the opportunity and
2 ability to understand the questions clearly and answer
3 them directly? Did the witness' testimony differ from
4 the testimony of other witnesses? These are a few of the
5 considerations that will help you determine the accuracy
6 of what each witness said.

7 Your job is to think about the testimony of
8 each witness you have heard and decide how much you
9 believe of what each witness had to say. In making up
10 your mind and reaching a verdict, do not make any
11 decision simply because there were more witnesses on one
12 side than on the other. Do not reach a conclusion on a
13 particular point just because there were more witnesses
14 testifying for one side on that point.

15 Impeachment by prior inconsistencies. The
16 testimony of a witness may be discredited by showing that
17 the witness testified falsely concerning a material
18 matter or by evidence that at some other time the witness
19 said or did something or failed to say or do something
20 which is inconsistent with the testimony the witness gave
21 at this trial.

22 Earlier statements of a witness were not
23 admitted in evidence to prove that the contents of those
24 statements are true. You may consider the earlier
25 statements only to determine whether you think they are

1 consistent or inconsistent with the trial testimony of
2 the witness and therefore whether they affect the
3 credibility of that witness.

4 If you believe that a witness has been
5 discredited in this manner, it is your exclusive right to
6 give the testimony of that witness whatever weight you
7 think it deserves.

8 Impeachment by prior convictions. You have
9 been told that the witnesses Dr. David Hoblit, Kristine
10 Ward, and Ray Robinson have been convicted of various
11 offenses. A conviction is a factor you may consider in
12 deciding whether to believe that witness, but it does not
13 necessarily destroy the witness' credibility. The
14 convictions have been brought to your attention only
15 because you may wish to consider them when you decide
16 whether you believe the witness' testimony. They are not
17 evidence of anything else.

18 Accomplice, informer. The testimony of an
19 alleged accomplice and the testimony of one who provides
20 evidence against a defendant for personal advantage or
21 vindication must always be examined and weighed by the
22 jury with greater care and caution than the testimony of
23 ordinary witnesses. You the jury must decide whether the
24 witness' testimony has been affected by any of those
25 circumstances or by the witness' interest in the outcome

1 of the case or by prejudice against the defendant or by
2 the benefits that the witness has or may receive. You
3 should keep in mind that such testimony is always to be
4 received with caution and weighed with great care.

5 You should never convict a defendant upon the
6 unsupported testimony of such a witness unless you
7 believe that testimony beyond a reasonable doubt.

8 Accomplice, co-defendant, plea agreement. In
9 this case the government called as witnesses alleged
10 accomplices, named as defendants in the first superseding
11 indictment or in a related Criminal Information, with
12 whom the government has entered into plea agreements
13 providing for the dismissal of some charges and a lesser
14 sentence than they would otherwise be exposed to for the
15 offenses to which they pleaded guilty. Such plea
16 bargaining, as it is called, has been approved as lawful
17 and proper and is expressly provided for in the rules of
18 this court.

19 An alleged accomplice, including one who has
20 entered into a plea agreement with the government, is not
21 prohibited from testifying. On the contrary, the
22 testimony of such a witness may alone be of sufficient
23 weight to sustain a verdict of guilty. You should keep
24 in mind that such testimony is always to be received with
25 caution and weighed with great care. You should never

1 convict a defendant upon the unsupported testimony of an
2 alleged accomplice unless you believe that testimony
3 beyond a reasonable doubt. The fact that an accomplice
4 has entered a plea of guilty to the offense charged is
5 not evidence of the guilt of any other person.

6 Witness' use of addictive drugs. The
7 testimony of someone who is shown to have used addictive
8 drugs during the period of time about which the witness
9 testified must always be examined and weighed by the jury
10 with greater care and caution than the testimony of
11 ordinary witnesses.

12 You should never convict any defendant upon
13 the unsupported testimony of such a witness unless you
14 believe that testimony beyond a reasonable doubt.

15 Expert witnesses. During the trial, you heard
16 the testimony of Dr. John C. Nelson and Dr. Jon-Paul
17 Harmer, who expressed opinions concerning the proper
18 standard for determining when conduct is in the usual
19 course of professional medical practice and what
20 constitutes a legitimate medical purpose. If scientific,
21 technical, or other specialized knowledge might assist
22 the jury in understanding the evidence or in determining
23 a fact in issue, a witness qualified by knowledge, skill,
24 experience, training, or education may testify and state
25 an opinion concerning such matters.

1 Merely because such a witness has expressed an
2 opinion does not mean, however, that you must accept this
3 opinion. You should judge such testimony like any other
4 testimony. You may accept it or reject it and give it as
5 much weight as you think it deserves considering the
6 witness' education and experience, the soundness of the
7 reasons given for the opinion, and all other evidence in
8 this case.

9 On or about. You will note that the first
10 superseding indictment charges that the offenses were
11 committed on or about specified months or years. The
12 government does not have to prove that the crimes were
13 committed on those exact dates, so long as the government
14 proves beyond a reasonable doubt that the defendant
15 committed the crimes on dates reasonably near the dates
16 stated in the first superseding indictment.

17 Caution, consider only crimes charged. You
18 are here to decide whether the government has proved
19 beyond a reasonable doubt that the defendant is guilty of
20 the crimes charged. The defendant is not on trial for
21 any act, conduct, or offense not alleged in the first
22 superseding indictment. Neither are you concerned with
23 the guilt of any other person or persons not on trial as
24 a defendant in this case, except as you are otherwise
25 instructed.

1 Caution, punishment. If the defendant is
2 found guilty, it will be my duty to decide what the
3 punishment will be. You should not be concerned with
4 punishment in any way. It should not enter your
5 consideration or discussion.

6 Single defendant, multiple counts. A separate
7 crime is charged in each count of the first superseding
8 indictment. Each count and the evidence pertaining to it
9 should be considered separately. The fact that you may
10 find the defendant guilty or not guilty as to one of the
11 crimes charged should not control your verdict as to any
12 other.

13 Statement, voluntariness. In determining
14 whether any statement claimed to have been made by a
15 defendant outside of court and after an alleged crime has
16 been committed was knowingly and voluntarily made, you
17 should consider the evidence concerning such a statement
18 with caution and great care and should give such weight
19 to the statement that you feel it deserves under all the
20 circumstances.

21 You may consider in that regard such factors
22 as the age, sex, training, education, occupation, and
23 physical and mental condition of the defendant and all
24 the other circumstances in evidence surrounding the
25 making of the statement.

1 Knowingly, to act. The word "knowingly," as
2 that term has been used from time to time in these
3 instructions, means that the act was done voluntarily and
4 intentionally, not because of mistake or accident. You
5 may find that the defendant had knowledge of a fact if
6 you find that the defendant deliberately closed his eyes
7 to what would otherwise have been obvious to him. While
8 knowledge on the part of the defendant cannot be
9 established merely by demonstrating that the defendant
10 was negligent, careless, or foolish, knowledge can be
11 inferred if the defendant deliberately blinded himself to
12 the existence of a fact.

13 Willfully, to act. The word "willfully," as
14 that term has been used from time to time in these
15 instructions, means that the act was committed
16 voluntarily and purposely, with the specific intent to do
17 something the law forbids; that is to say, with bad
18 purpose either to disobey or disregard the law.

19 Summaries and charts received in evidence.
20 Certain charts and summaries have been received into
21 evidence. Charts and summaries are valid only to the
22 extent that they accurately reflect the underlying
23 supporting evidence. You should give them only such
24 weight as you think they deserve.

25 Transcripts of tape-recorded conversations.

1 Exhibits 1a and 4a have been identified as typewritten
2 transcripts of oral conversations which can be heard on
3 the tape recordings received in evidence as Exhibits 1
4 and 4. The transcripts also purport to identify the
5 speakers engaged in such conversations.

6 I have admitted the transcripts for the
7 limited and secondary purpose of aiding you in following
8 the contents of the conversations as you listen to the
9 tape recordings and also to aid you in identifying the
10 speakers.

11 You are specifically instructed that whether
12 the transcripts correctly or incorrectly reflect the
13 contents of the conversations or the identities of the
14 speakers is entirely for you to determine based upon your
15 own evaluation of the testimony you have heard concerning
16 the preparation of the transcripts and from your own
17 examination of the transcripts in relation to your
18 hearing of the tape recordings themselves as the primary
19 evidence of their own contents; and if you should
20 determine that the transcripts are in any respect
21 incorrect or unreliable, you should disregard them to
22 that extent.

23 Stipulations. During the presentation of the
24 evidence, you were told that the parties had agreed or
25 stipulated to certain facts. That simply means that you

1 should treat these facts as having been proved. There is
2 no disagreement over these facts. So, there is no need
3 for evidence beyond the stipulation itself by any party
4 on these points. You must accept these stipulations as
5 fact, even if nothing more was said about them one way or
6 the other.

7 Judicial notice. The court has taken judicial
8 notice of certain facts or events. When the court
9 declares that it has taken judicial notice of some fact
10 or event, you may accept the court's declaration as
11 evidence and regard as proved the fact or event which has
12 been judicially noticed.

13 Offenses charged. At this time I will explain
14 the first superseding indictment, which charges four
15 separate criminal offenses called "counts." I will not
16 read the first superseding indictment to you at length
17 because you will be given a copy of it for reference
18 during your deliberations.

19 In summary, Count 1 charges that Defendant
20 David A. Vogel knowingly and willfully conspired together
21 and with others to distribute or dispense hydrocodone, a
22 Schedule III controlled substance, outside the usual
23 course of professional practice or not for a legitimate
24 medical purpose.

25 Count 2 charges that David A. Vogel conspired

1 with others to launder proceeds obtained from the illegal
2 distribution of dispensing of hydrocodone.

3 Counts 3 and 4 charge that David A. Vogel
4 committed or attempted to commit money laundering through
5 the purchase of a condominium at Trump Tower in New York
6 City and the purchase of a certain rare coin.

7 I will now explain the law governing each of
8 these offenses.

9 First superseding indictment, Count 1.
10 Title 21, United States Code, Section 846 makes it a
11 crime for anyone to conspire with someone else to commit
12 a violation of certain controlled substances laws of the
13 United States. In this case, Count 1 of the first
14 superseding indictment charges that the defendant,
15 David A. Vogel, did knowingly and intentionally conspire,
16 combine, and agree to manufacture, distribute, dispense,
17 and possess with the intent to manufacture, distribute,
18 or dispense, outside the scope of professional practice
19 and not for a legitimate medical purpose, a controlled
20 substance, hydrocodone, a violation of Title 21, United
21 States Code, Sections 841(a)(1) and 841(b)(1)(D).

22 A conspiracy is an agreement between two or
23 more persons to join together to accomplish some unlawful
24 purpose. It is a kind of partnership in crime in which
25 each member becomes the agent of every other member.

1 For you to find the defendant guilty of this
2 crime, you must be convinced that the government has
3 proved each of the following beyond a reasonable doubt:

4 One, that two or more persons directly or
5 indirectly reached an agreement to distribute or dispense
6 hydrocodone outside the usual course of professional
7 practice or not for a legitimate medical purpose;

8 Two, that the defendant knew of the unlawful
9 purpose of the agreement; and

10 Three, that the defendant joined in the
11 agreement willfully; that is, with the intent to further
12 its unlawful purpose.

13 One may become a member of a conspiracy
14 without knowing all the details of the unlawful scheme or
15 the identities of all the other alleged conspirators. If
16 the defendant understands the unlawful nature of a plan
17 or scheme and knowingly and intentionally joins in that
18 plan or scheme on one occasion, that is sufficient to
19 convict him for conspiracy even though the defendant had
20 not participated before and even though the defendant
21 played only a minor part.

22 The government need not prove that the alleged
23 conspirators entered into any formal agreement, nor that
24 they directly stated between themselves all the details
25 of the scheme. Similarly, the government need not prove

1 that all the details of the scheme alleged in the first
2 superseding indictment were actually agreed upon or
3 carried out. Nor must it prove that all of the persons
4 alleged to have been members of the conspiracy were such
5 or that the alleged conspirators actually succeeded in
6 accomplishing their unlawful objectives.

7 Mere presence at the scene of an event, even
8 with knowledge that a crime is being committed, or the
9 mere fact that certain persons may have associated with
10 each other and may have assembled together and discussed
11 common aims and interests, does not necessarily establish
12 proof of the existence of a conspiracy. Also, a person
13 who has no knowledge of a conspiracy but who happens to
14 act in a way which advances some purpose of a conspiracy
15 does not thereby become a conspirator.

16 Hydrocodone, a Schedule III controlled
17 substance. You are instructed as a matter of law that,
18 for purposes of this trial, hydrocodone is a Schedule III
19 controlled substance.

20 Legitimate medical purpose, usual course of
21 professional practice. In this case the defendant is
22 charged with conspiring to illegally distribute or
23 dispense hydrocodone through the use of invalid
24 prescriptions. The Federal Controlled Substances Act,
25 Title 21, United States Code, Section 841(a)(1), makes it

1 a crime for anyone to knowingly or intentionally
2 manufacture, distribute, or dispense a controlled
3 substance. Medical practitioners registered with the
4 Attorney General and properly licensed under state law,
5 such as physicians and pharmacists, are excepted from
6 this general prohibition but only to the extent that they
7 distribute or dispense a controlled substance pursuant to
8 a valid prescription.

9 For a prescription to be valid, the law
10 requires that it be issued for a legitimate medical
11 purpose by an individual practitioner acting in the usual
12 course of his professional practice. To demonstrate that
13 a prescription is not valid, the government need only
14 prove either that it was not issued for a legitimate
15 medical purpose or that it was issued outside the usual
16 course of professional practice. The term "usual course
17 of professional practice" means acting in accordance with
18 a standard of medical practice generally recognized and
19 accepted in the United States. This is an objective
20 standard that considers what is generally recognized in
21 the medical profession, not what an individual
22 practitioner subjectively believes the standard should
23 be.

24 The practice of medicine is primarily governed
25 by state law. Texas laws and regulations, including the

1 rules of the Texas Medical Board and the Texas State
2 Board of Pharmacy, establishes standards of care for
3 Texas medical practitioners. While it is not your role
4 to decide whether the defendant is subject to liability
5 for the violation of any Texas law, regulation, or board
6 rule, the laws, regulations, and rules governing the
7 practice of medicine and pharmacy are relevant to your
8 determination of whether the defendant conspired to
9 distribute hydrocodone outside the usual course of
10 professional practice or not for a legitimate medical
11 purpose in violation of the Federal Controlled Substances
12 Act, as charged.

13 You cannot find the defendant guilty of the
14 charged drug conspiracy solely on the ground that his
15 acts or the acts of alleged co-conspirators violate Texas
16 laws, regulations, or rules governing the practice of
17 medicine or the practice of pharmacy unless you also
18 believe that those acts violate the federal drug laws;
19 namely, that the defendant conspired to distribute
20 hydrocodone outside the usual course of professional
21 practice or not for a legitimate medical purpose.

22 I will now describe some of the applicable
23 Texas laws, rules, and regulations in effect during the
24 relevant time period that may guide your determination on
25 that issue.

1 Texas Health and Safety Code, Section
2 481.071(a). The Texas Controlled Substances Act
3 provides: A practitioner may not prescribe, dispense,
4 deliver, or administer a controlled substance or cause a
5 controlled substance to be administered under the
6 practitioner's direction and supervision except for a
7 valid medical purpose and in the course of medical
8 practice.

9 Texas Administrative Code, Section 190.8. The
10 Texas Medical Practice Act provides: Practice
11 inconsistent with public health and welfare. Failure to
12 practice in an acceptable professional manner consistent
13 with public health and welfare within the meaning of the
14 act includes, but is not limited to:

15 (A) failure to treat a patient according to
16 the generally accepted standard of care;

17 (H) failure to disclose reasonable alternative
18 treatments to a proposed procedure or treatment;

19 (L) prescription of any dangerous drug or
20 controlled substance without first establishing a proper
21 professional relationship with the patient.

22 (i) a proper relationship, at a minimum
23 requires:

24 (I) establishing that the person requesting
25 the medication is in fact who the person claims to be;

1 (II) establishing a diagnosis through the use
2 of acceptable medical practices such as patient history,
3 mental status examination, physical examination, and
4 appropriate diagnostic and laboratory testing. An online
5 or telephonic evaluation by questionnaire is inadequate;

6 (III) discussing with the patient the
7 diagnosis and the evidence for it, the risks and benefits
8 of various treatment options; and

9 (IV) ensuring the availability of the licensee
10 or coverage of the patient for appropriate follow-up
11 care.

12 Texas State Board of Medical Examiners policy
13 statement on Internet prescribing. At the December 8th
14 through 11th, 1999, Texas Medical Board meeting, the
15 board established the following policy regarding Internet
16 prescribing:

17 Section 164.053 of the Texas Occupations Code
18 authorizes the board to discipline a licensed Texas
19 physician for unprofessional conduct that is likely to
20 deceive or defraud the public or injure the public.
21 Section 3.08(4)(E) defines unprofessional or dishonorable
22 conduct to include prescribing or administering a drug or
23 treatment that is nontherapeutic in nature or
24 nontherapeutic in the manner the drug or treatment is
25 administered or prescribed. Section 164.0353(a)(5)

1 defines unprofessional or dishonorable conduct to include
2 prescribing, administering, or dispensing in a manner not
3 consistent with public health and welfare dangerous drugs
4 as defined by Chapter 483, Health & Safety Code.

5 Section 3.08(18) authorizes the board to
6 discipline a licensed Texas physician for professional
7 failure to practice medicine in an acceptable manner
8 consistent with public health and welfare.

9 It is unprofessional conduct for a physician
10 to initially prescribe any dangerous drugs or controlled
11 substances without first establishing a proper
12 physician/patient relationship. A proper
13 physician/patient relationship, at a minimum, requires:

14 (1) verifying that the person requesting the
15 medicine is in fact who they claim to be;

16 (2) establishing a diagnosis through the use
17 of accepted medical practices such as patient history,
18 mental status exam, physical examination, and appropriate
19 diagnostic and laboratory testing;

20 (3) discussing with the patient the diagnosis
21 and the evidence for it, the risks and benefits of
22 various treatment options; and

23 (4) ensuring the availability of the physician
24 or coverage of the patient for appropriate follow-up
25 care.

1 An online or telephonic evaluation by
2 questionnaire is inadequate.

3 Texas State Board of Pharmacy statement on
4 Internet prescribing. The Texas State Board of Medical
5 Examiners policy statement on Internet prescribing is
6 important to pharmacists because a prescription issued
7 without a proper physician/patient relationship is not a
8 valid prescription. Board rules in Section 281.7(a)(2)
9 specify that unprofessional conduct includes dispensing a
10 prescription drug order not issued for a legitimate
11 medical purpose or in the usual course of professional
12 practice. Your pharmacist and/or pharmacy license could
13 be the subject of disciplinary action if you are
14 dispensing dangerous drugs or controlled substances
15 pursuant to prescriptions from physicians who have not
16 established a proper physician/patient relationship.

17 Texas Administrative Code, Section 174.4. The
18 Texas Administrative Code provides:

19 (a) Evaluation of the patient. Physicians who
20 utilize the Internet must ensure a proper
21 physician/patient relationship is established that at a
22 minimum includes:

23 (1) establishing that the person requesting
24 the treatment is in fact who the person claims to be;

25 (2) establishing a diagnosis through the use

1 of acceptable medical practices such as patient history,
2 mental status examination, physical examination, and
3 appropriate diagnostic and laboratory testing to
4 establish diagnoses and identify underlying conditions
5 and/or contraindications to treatment
6 recommended/provided;

7 (3) discussing with the patient the diagnosis
8 and the evidence for it, the risks and benefits of
9 various treatment options; and

10 (4) ensuring the availability of the physician
11 or coverage of the patient for appropriate follow-up
12 care.

13 (b) Treatment. Treatment and consultation
14 recommendations made in an online setting, including
15 issuing a prescription via electronic means, will be held
16 to the same standards of appropriate practice as those in
17 traditional face-to-face settings. An online or
18 telephonic evaluation by questionnaire does not
19 constitute an acceptable standard of care.

20 (c) State licensure. Physicians who treat and
21 prescribe through the Internet are practicing medicine
22 and must possess appropriate licensure in all
23 jurisdictions where patients reside.

24 (d) Electronic communications.

25 (1) written policies and procedures must be

1 maintained when using electronic mail for
2 physician/patient communications. Policies must be
3 evaluated periodically for currency. Such policies and
4 procedures must address:

5 (A) privacy to assure confidentiality and
6 integrity of patient-identifiable information;

7 (B) health care personnel, in addition to the
8 physician, who will process messages;

9 (C) hours of operation and availability;

10 (D) types of transactions that will be
11 permitted electronically;

12 (E) required patient information to be
13 included in the communication, such as patient name,
14 identification number, and type of transaction;

15 (F) archival and retrieval; and

16 (G) quality oversight mechanisms.

17 (2) all patient/physician email, as well as
18 other patient-related electronic communications, must be
19 stored and filed in the patient's medical record.

20 (3) patients must be informed of alternative
21 forms of communication for urgent matters.

22 (e) Medical records.

23 (1) medical records must include copies of all
24 patient-related electronic communications, including
25 patient/physician email, prescriptions, laboratory and

1 test results, evaluations and consultations, records of
2 past care and instructions.

3 (2) notice of privacy practices related to the
4 use of email must be filed in the medical record.

5 (f) Disclosure. Physician medical practice
6 sites must clearly disclose:

7 (1) ownership of the Web site;

8 (2) specific services provided;

9 (3) office address and contact information;

10 (4) licensure and qualifications of physicians
11 and associated health care providers;

12 (5) fees for online consultation and services
13 and how payment is to be made;

14 (6) financial interest in any information,
15 products, or services;

16 (7) appropriate uses and limitations of the
17 site, including providing health advice and emergency
18 health situations;

19 (8) uses and response times for emails,
20 electronic messages, and other communications transmitted
21 via the site;

22 (9) to whom patient health information may be
23 disclosed and for what purpose;

24 (10) rights of patients with respect to
25 patient health information; and

1 (11) information collected and any passive
2 tracking mechanisms utilized.

3 (g) Accountability. Medical practice sites
4 must provide patients with a clear mechanism to:

5 (1) access, supplement, and amend
6 patient-provided personal health information;

7 (2) provide feedback regarding the site and
8 the quality of information and services; and

9 (3) register claimants, including information
10 regarding filing a complaint, with the Texas State Board
11 of Medical Examiners as provided for in Chapter 178 of
12 this title relating to complaints.

13 (h) Advertising/Promotion of goods or
14 products. Advertising or promotion of goods or products
15 from which the physician receives direct remuneration or
16 incentives is prohibited.

17 Texas Occupations Code, Section 562.056(a).

18 The Texas Occupations Code provides:

19 Before dispensing a prescription, a pharmacist
20 shall determine, in the exercise of sound professional
21 judgment, that the prescription is a valid prescription.
22 A pharmacist may not dispense a prescription drug if the
23 pharmacist knows or should know that the prescription was
24 issued on the basis of an Internet-based or telephonic
25 consultation without a valid practitioner/patient

1 relationship.

2 Texas Occupations Code, Section 562.111(a).

3 The Texas Occupations Code provides:

4 A pharmacy shall ensure that its agent and
5 employees, before dispensing a prescription, determine in
6 the exercise of sound professional judgment that the
7 prescription is a valid prescription. A pharmacy may not
8 dispense a prescription drug if an agent or employee of
9 the pharmacy knows or should know that the prescription
10 was issued on the basis of an Internet-based or
11 telephonic consultation without a valid
12 practitioner/patient relationship.

13 Texas Occupations Code, Section 164.053. The
14 Texas Occupations Code provides:

15 (a) unprofessional or dishonorable conduct
16 likely to deceive or defraud the public includes conduct
17 in which a physician:

18 (1) commits an act that violates any state or
19 federal law if the act is connected with the physician's
20 practice of medicine;

21 (3) writes prescriptions for or dispenses to a
22 person who:

23 (A) is known to be an abuser of narcotic
24 drugs, controlled substances, or dangerous drugs; or

25 (B) the physician should have known was an

1 abuser of narcotic drugs, controlled substances, or
2 dangerous drugs.

3 (4) writes false or fictitious prescriptions
4 for:

5 (A) dangerous drugs as defined by Chapter 483,
6 Health & Safety Code; or

7 (B) controlled substances scheduled in
8 Chapter 481, Health & Safety Code, or the Comprehensive
9 Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.,
10 Section 801 et seq.

11 (5) prescribes or administers a drug or
12 treatment that is nontherapeutic in nature or
13 nontherapeutic in the manner the drug or treatment is
14 administered or prescribed;

15 (6) prescribes, administers, or dispenses in a
16 manner inconsistent with public health and welfare:

17 (A) dangerous drugs as defined by Chapter 483,
18 Health & Safety Code; or

19 (B) controlled substances scheduled in
20 Chapter 481, Health & Safety Code, or the Comprehensive
21 Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.,
22 Section 801 et seq.

23 (8) fails to supervise adequately the
24 activities of those acting under the supervision of the
25 physician; or

1 (9) delegates professional medical
2 responsibility or acts to a person if the delegating
3 physician knows or has reason to know that the person is
4 not qualified by training, experience or licensure to
5 perform the responsibility or acts.

6 Texas Occupations Code, Chapter 107,
7 Intractable Pain Treatment Act. Prior to September 1st,
8 2003, the Texas Intractable Pain Treatment Act provided:

9 (3) intractable pain means a pain state in
10 which the cause of the pain cannot be removed or
11 otherwise treated and which in the generally accepted
12 course of medical practice no relief or cure of the cause
13 of the pain is possibly or none has been found after
14 reasonable efforts.

15 Section 3, notwithstanding any other provision
16 of law, a physician may prescribe or administer dangerous
17 drugs or controlled substances to a person in the course
18 of the physician's treatment of a person for intractable
19 pain.

20 Section 5, no physician may be subject to
21 disciplinary action by the board for prescribing or
22 administering dangerous drugs or controlled substances in
23 the course of treatment of a person for intractable pain.

24 Section 6(a), except as provided in
25 Subsection C of this section, the provisions of this act

1 shall not apply to those persons being treated by the
2 physician for chemical dependency because of their use of
3 dangerous drugs or controlled substances.

4 (b) the provisions of this act provide no
5 authority to a physician to prescribe or administer
6 dangerous drugs or controlled substances to a person for
7 other than legitimate medical purposes as defined by the
8 board and who the physician knows or should know to be
9 using drugs for nontherapeutic purposes.

10 (c) the provisions of this act authorize a
11 physician to treat a patient who develops an acute or
12 chronic painful medical condition with a dangerous drug
13 or a controlled substance to relieve the patient's pain
14 using appropriate doses, for an appropriate length of
15 time, and for as long as the pain persists. A patient
16 under this subsection includes a person who:

17 (1) is a current drug abuser;

18 (2) is not currently abusing drugs but has a
19 history of drug abuse; or

20 (3) lives in an environment that poses a risk
21 for drug misuse or diversion of the drug to illegitimate
22 use.

23 (d) a physician who treats a patient under
24 Subsection C of this section shall monitor the patient to
25 ensure the prescribed dangerous drug or controlled

1 substance is used only for the treatment of the patient's
2 painful medical condition. To ensure that the prescribed
3 dangerous drug or controlled substance is not being
4 diverted to another use and the appropriateness of the
5 treatment of the patient's targeted symptoms, the
6 physician shall:

7 (1) specifically document:

8 (A) the understanding between the physician
9 and patient about the patient's prescribed treatment;

10 (B) the name of the drug prescribed;

11 (C) the dosage and method of taking the
12 prescribed drug.

13 (D) the number of dose units prescribed; and

14 (E) the frequency of prescribing and
15 dispensing the drug.

16 (2) consult with a psychologist, psychiatrist,
17 expert in the treatment of addictions, or other health
18 care professional, as appropriate.

19 Section 7, nothing in this act shall deny the
20 right of the Texas State Board of Medical Examiners to
21 cancel, revoke, or suspend the license of any physician
22 who:

23 (1) prescribes, administers, or dispenses a
24 drug or treatment for other than legitimate medical
25 purposes as defined by the board and that is

1 nontherapeutic in nature or nontherapeutic in the manner
2 the drug or treatment is administered or prescribed;

3 (2) fails to keep complete and accurate
4 records of purchases and disposals of drugs listed in the
5 Texas Controlled Substances Act, Chapter 481, Health &
6 Safety Code, or of controlled substances scheduled in the
7 Federal Comprehensive Drug Abuse Prevention and Control
8 Act of 1970, 21 U.S.C., Section 801 et seq, Public
9 Law 91-513, including records of:

10 (A) the date of purchase;

11 (B) the sale or disposal of the drugs by the
12 physician;

13 (C) the name and address of the person
14 receiving the drugs; and

15 (D) the reason for the disposal of or the
16 dispensing of the drugs to the person.

17 (3) writes false or fictitious prescriptions
18 for dangerous drugs as defined by Chapter 483, Health &
19 Safety Code, for controlled substances scheduled by the
20 Texas Controlled Substances Act, Chapter 481, Health &
21 Safety Code, or for controlled substances scheduled in
22 the Federal Comprehensive Drug Abuse Prevention and
23 Control Act of 1970, 21 U.S.C., Section 801 et seq,
24 Public Law 91-513; or

25 (4) prescribes, administers, or dispenses in a

1 manner not consistent with public health and welfare
2 dangerous drugs as defined by Chapter 483, Health &
3 Safety Code, controlled substances scheduled in the Texas
4 Controlled Substances Act, Chapter 481, Health & Safety
5 Code, or controlled substances scheduled in the Federal
6 Comprehensive Drug Abuse Prevention and Control Act of
7 1970, 21 U.S.C., Section 801 et seq, Public Law 91-513.

8 Section 8, this act is not intended nor shall
9 it be interpreted to allow for the prescription of any
10 illegal substance to any patient or person at any time in
11 violation of federal law.

12 Beginning on September 1st, 2003, the Texas
13 Intractable Pain Treatment Act provided:

14 (2) "intractable pain" means a state of pain
15 for which:

16 (A) the cause of the pain cannot be removed or
17 otherwise treated; and

18 (B) in the generally accepted course of
19 medical practice, relief or cure of the cause of the
20 pain:

21 (i) is not possible; or

22 (ii) has not been found after reasonable
23 efforts.

24 (3) "physician" means a physician licensed by
25 the board.

1 Except as provided by Subchapter C, this
2 chapter does not apply to a person being treated by a
3 physician for chemical dependency because of the person's
4 use of a dangerous drug or controlled substance.

5 Notwithstanding any other law, a physician may
6 prescribe or administer a dangerous drug or controlled
7 substance to a person in the course of the physician's
8 treatment of the person for intractable pain.

9 This chapter does not authorize a physician to
10 prescribe or administer to a person a dangerous drug or
11 controlled substance:

12 (1) for a purpose that is not a legitimate
13 medical purpose as defined by the board; and

14 (2) if the physician knows or should know the
15 person is using drugs for a nontherapeutic purpose.

16 In this subchapter, "patient" includes a
17 person who:

18 (1) is currently abusing a dangerous drug or
19 controlled substance;

20 (2) is not currently abusing such a drug or
21 substance but has a history of such abuse; or

22 (3) lives in an environment that poses a risk
23 for misuse or diversion to illegitimate use of such a
24 drug or substance.

25 This chapter authorizes a physician to treat a

1 patient with an acute or chronic painful medical
2 condition with a dangerous drug or controlled substance
3 to relieve the patient's pain using appropriate doses,
4 for an appropriate length of time, and for as long as the
5 pain persists.

6 A physician who treats a patient under this
7 subchapter shall monitor the patient to ensure that a
8 prescribed dangerous drug or controlled substance is used
9 only for the treatment of the patient's painful medical
10 condition.

11 To ensure that a prescribed dangerous drug or
12 controlled substance is not diverted to another use and
13 to ensure the appropriateness of the treatment of the
14 patient's targeted symptoms, the physician shall:

15 (1) specifically document:

16 (A) the understanding between the physician
17 and patient about the patient's prescribed treatment;

18 (B) the name of the drug or substance
19 prescribed;

20 (C) the dosage and method of taking the
21 prescribed drug or substance;

22 (D) the number of dose units prescribed; and

23 (E) the frequency of prescribing and
24 dispensing the drug or substance; and

25 (2) consult with a psychologist, psychiatrist,

1 expert in the treatment of addictions, or other health
2 care professional, as appropriate.

3 A physician is not subject to disciplinary
4 action by the board for prescribing or administering a
5 dangerous drug or controlled substance in the course of
6 treatment of a person with intractable pain.

7 This chapter does not affect the authority of
8 the board to revoke or suspend the license of a physician
9 who:

10 (1) prescribes, administers, or dispenses a
11 drug or treatment:

12 (A) for a purpose that is not a legitimate
13 medical purpose as defined by the board; and

14 (B) that is nontherapeutic in nature or
15 nontherapeutic in the manner the drug or treatment is
16 administered or prescribed;

17 (2) fails to keep a complete and accurate
18 record of the purchase and disposal of:

19 (A) a drug listed in Chapter 481, Health &
20 Safety Code; or

21 (B) a controlled substance scheduled in the
22 Comprehensive Drug Abuse Prevention and Control Act of
23 1970, 21 U.S.C., Section 801 et seq;

24 (3) writes a false or fictitious prescription
25 for:

1 (A) a dangerous drug as defined by Chapter
2 483, Health & Safety Code;

3 (B) a controlled substance listed in a
4 schedule under Chapter 481, Health & Safety Code; or

5 (C) a controlled substance scheduled in the
6 Comprehensive Drug Abuse Prevention and Control Act of
7 1970, 21 U.S.C., Section 801 et seq; or

8 (4) prescribes, administers, or dispenses in a
9 manner inconsistent with public health and welfare:

10 (A) a dangerous drug as defined by
11 Chapter 483, Health & Safety Code;

12 (B) a controlled substance listed in a
13 schedule under Chapter 481, Health & Safety Code; or

14 (C) a controlled substance scheduled in the
15 Comprehensive Drug Abuse Prevention and Control Act of
16 1970, 21 U.S.C., Section 801 et seq.

17 (b) for purposes of Subsection (a)(2), the
18 physician's records must include a record of:

19 (1) the date of purchase;

20 (2) the sale or disposal of the drug or
21 substance by the physician;

22 (3) the name and address of the person
23 receiving the drug or substance; and

24 (4) the reason for the disposal or dispensing
25 of the drug or substance to the person.

1 Texas Administrative Code, Section 174.2. The
2 Texas Administrative Code provides:

3 (5) Telemedicine medical service. A health
4 care service initiated by a physician or provided by a
5 health professional acting under a physician delegation
6 and supervision, for purposes of assessment by a health
7 professional, diagnosis or consultation by a physician,
8 treatment, or the transfer of medical data, that requires
9 the use of advanced telecommunications other than by
10 telephone or facsimile as described in Section 57.042 of
11 the Utilities Code.

12 Texas Utilities Code, Section 57.042. The
13 Texas Utilities Code provides:

14 (12) "Telemedicine medical service" means a
15 health care service initiated by a physician or provided
16 by a health professional acting under physician
17 delegation and supervision, for purposes of patient
18 assessment by a health professional, diagnosis or
19 consultation by a physician, treatment, or the transfer
20 of medical data, that requires the use of advanced
21 telecommunications technology, other than by telephone or
22 facsimile, including:

23 (A) compressed digital interactive video,
24 audio, or data transmission;

25 (B) clinical data transmission using computer

1 imaging by way of still-image capture and store and
2 forward; and

3 (C) other technology that facilitates access
4 to health care services or medical specialty expertise.

5 Aiding and abetting, agency. The guilt of a
6 defendant in a criminal case may be established without
7 proof that the defendant personally did every act
8 constituting the offense alleged. The law recognizes
9 that ordinarily anything a person can do for himself may
10 also be accomplished by him through the direction of
11 another person as his or her agent or by acting in
12 concert with or under the direction of another person or
13 persons in a joint effort or enterprise.

14 If another person is acting under the
15 direction of the defendant or if the defendant joins
16 another person and performs acts with the intent to
17 commit a crime, then the law holds the defendant
18 responsible for the acts and conduct of such other
19 persons just as though the defendant had committed the
20 acts or engaged in such conduct.

21 Before the defendant may be held criminally
22 responsible for the acts of others, it is necessary that
23 the accused deliberately associate himself in some way
24 with the crime and participate in it with the intent to
25 bring about the crime.

1 Of course, mere presence at the scene of a
2 crime and knowledge that a crime is being committed are
3 not sufficient to establish that the defendant either
4 directed or aided and abetted the crime unless you find
5 beyond a reasonable doubt that the defendant was a
6 participant and not merely a knowing spectator.

7 In other words, you may not find the defendant
8 guilty unless you find beyond a reasonable doubt that
9 every element of the offense as defined in these
10 instructions was committed by some person or persons and
11 that the defendant voluntarily participated in its
12 commission with the intent to violate the law.

13 First superseding indictment, Count 2.
14 Defendant David A. Vogel is charged in Count 2 of the
15 first superseding indictment with the crime of conspiracy
16 to commit money laundering in violation of Title 18,
17 United States Code, Section 1956(h). Title 18, United
18 States Code, Section 1956(h) makes it a crime for anyone
19 to conspire with someone else to commit a money
20 laundering offense. In this case the defendant is
21 charged with conspiring to commit domestic money
22 laundering offenses involving the promotion of a
23 specified unlawful activity.

24 As already explained, a conspiracy is an
25 agreement between two or more persons to join together to

1 accomplish some unlawful purpose. It is a kind of
2 partnership in crime in which each member becomes the
3 agent of every other member.

4 For you to find the defendant guilty of this
5 crime, you must be convinced that the government has
6 proved each of the following beyond a reasonable doubt:

7 One, that two or more persons made an
8 agreement to commit money laundering, specifically
9 Title 18, United States Code, Section 1956(a)(1)(A)(i),
10 as defined below in these instructions and as charged in
11 the first superseding indictment; and

12 Two, that the defendant knew the unlawful
13 purpose of the agreement and joined in it willfully; that
14 is, with the intent to further the unlawful purpose.

15 One may become a member of a conspiracy
16 without knowing all the details of the unlawful scheme or
17 the identities of all the other alleged conspirators. If
18 the defendant understands the unlawful nature of a plan
19 or scheme and knowingly and intentionally joins in that
20 plan or scheme on one occasion, that is sufficient to
21 convict him for conspiracy even though the defendant had
22 not participated before and even though the defendant
23 played only a minor part.

24 The government need not prove that the alleged
25 conspirators entered into any formal agreement nor that

1 they directly stated between themselves all the details
2 of the scheme. Similarly, the government need not prove
3 that all of the details of the scheme alleged in the
4 first superseding indictment were actually agreed upon or
5 carried out. Nor must it prove that all of the persons
6 alleged to have been members of the conspiracy were such
7 or that the alleged conspirators actually succeeded in
8 accomplishing their unlawful objectives.

9 Mere presence at the scene of an event, even
10 with knowledge that a crime is being committed, or the
11 mere fact that certain persons may have associated with
12 each other and may have assembled together and discussed
13 common aims and interests, does not necessarily establish
14 proof of the existence of a conspiracy. Also, a person
15 who has no knowledge of a conspiracy but who happens to
16 act in a way which advances some purpose of a conspiracy,
17 does not thereby become a conspirator.

18 The object of the conspiracy is alleged to be
19 money laundering promotion in violation of Title 18,
20 United States Code, Section 1956(a)(1)(A)(i). In order
21 to prove that the defendant made an agreement to commit
22 the crime of money laundering promotion, as charged, you
23 will need to consider the elements of that crime. The
24 government does not have to prove that the defendant
25 actually committed that crime, only that there was an

1 agreement to commit the crime.

2 Title 18, United States Code,
3 Section 1956(a)(1)(A)(i) makes it a crime for anyone
4 knowingly to use the proceeds of certain illegal activity
5 to promote the carrying out of certain illegal activity.
6 For you to find the defendant guilty of agreeing to
7 commit money laundering promotion, you must be convinced
8 that the government has proved beyond a reasonable doubt
9 that he agreed to:

10 One, knowingly conduct a financial
11 transaction;

12 Two, that involved proceeds of a specified
13 unlawful activity; namely, distributing or dispensing
14 hydrocodone outside the course of professional practice
15 or not for a legitimate medical purpose;

16 Three, knowing that the property involved in
17 the financial transaction represented the proceeds of
18 some form of unlawful activity; and

19 Four, intending to promote the carrying on of
20 the specified unlawful activity.

21 With respect to the second element, the
22 government must show that in fact the property was the
23 proceeds of the illegal distribution or dispensing of
24 controlled substances in violation of Title 21, United
25 States Code, Sections 846 and 841(a)(1), which is a

1 specified unlawful activity under the statute. I
2 instruct you that the illegal distribution or dispensing
3 of controlled substances in violation of Title 21, United
4 States Code, Sections 846 and 841(a)(1) is a specified
5 unlawful activity under the statute.

6 With respect to the third element, the
7 government must prove that the defendant knew that the
8 property involved in the transaction was the proceeds of
9 some kind of crime that is a felony under federal or
10 state law, although it is not necessary to show that he
11 knew exactly what crime generated the funds. I instruct
12 you that the illegal distribution or dispensing of
13 controlled substances in violation of Title 21, United
14 States Code, Sections 846 and 841(a)(1) is a felony.

15 The term "transaction" includes a purchase,
16 sale, loan, pledge, gift, transfer, delivery or other
17 disposition, and with respect to a financial institution
18 includes a deposit, withdrawal, transfer between
19 accounts, exchange of currency, loan, extension of
20 credit, purchase or sale of any stock, bond, certificate
21 of deposit, or other monetary instrument, or any other
22 payment, transfer, or delivery by, through, or to a
23 financial institution, by whatever means effected.

24 The term "financial transaction" includes any
25 transaction, as that term has just been defined, which

1 involves the movement of funds by wire or other means or
2 involving one or more monetary instruments, which in any
3 way or degree affects interstate or foreign commerce, or
4 a transaction involving the use of a financial
5 institution which is engaged in, or the activities of
6 which affect, interstate or foreign commerce in any way
7 or degree.

8 It is not necessary for the government to show
9 that the defendant actually intended or anticipated an
10 effect on interstate commerce by his actions or that
11 commerce was actually affected. All that is necessary is
12 that the natural and probable consequence of the acts the
13 defendant agreed to perform would be to affect interstate
14 commerce. If you decide that there would be any effect
15 at all on interstate commerce, then that is enough to
16 satisfy this element. The effect can be minimal.

17 The term "conduct" includes initiating or
18 concluding or participating in initiating or concluding a
19 transaction.

20 In the context of this money laundering
21 statute, the term "proceeds" is defined as "profits."

22 First superseding indictment, Counts 3 and 4.
23 Defendant David A. Vogel is charged in Counts 3 and 4 of
24 the first superseding indictment with money laundering, a
25 violation of Title 18, United States Code, Section 1957.

1 Count 3 charges that the defendant engaged in a monetary
2 transaction in property derived from a specified unlawful
3 activity by purchasing a rare coin for approximately
4 \$36,000 on or about April 19th, 2005. Count 4 charges
5 that the defendant engaged in a monetary transaction in
6 property derived from a specified unlawful activity by
7 transferring approximately \$200,000 toward the purchase
8 of a residential condominium on or about November 16th,
9 2004. It is alleged that the funds used in those
10 transactions were derived from the conspiracy to
11 distribute or dispense hydrocodone outside the course of
12 professional practice or not for a legitimate medical
13 purpose as charged in Count 1 of the first superseding
14 indictment.

15 Title 18, United States Code, Section 1957
16 makes it a crime for anyone to engage in certain kinds of
17 financial transactions commonly known as money
18 laundering. For you to find the defendant guilty of this
19 crime, you should be convinced that the government has
20 proved each of the following beyond a reasonable doubt:

21 One, that the defendant knowingly engaged or
22 attempted to engage in a monetary transaction;

23 Two, that the defendant knew the transaction
24 involved criminally derived property;

25 Three, that the property had a value of

1 greater than \$10,000;

2 Four, that the property was, in fact, derived
3 from the distribution or dispensing of hydrocodone
4 outside the course of professional practice or not for a
5 legitimate medical purpose; and

6 Five, that the transaction occurred in the
7 United States.

8 The term "monetary transaction" means the
9 deposit, withdrawal, transfer, or exchange, in or
10 affecting interstate commerce, of funds or a monetary
11 instrument by, through, or to a financial institution.

12 The term "criminally derived property" means
13 any property constituting or derived from proceeds
14 obtained from a criminal offense. The government must
15 prove only that the defendant knew that the property
16 involved in the monetary transaction constituted or was
17 derived from proceeds obtained by some criminal offense.
18 The government does not have to prove that the defendant
19 knew the precise nature of that criminal offense or that
20 the defendant knew that the property involved in the
21 transaction represented the proceeds of distributing or
22 dispensing hydrocodone outside the course of professional
23 practice or not for a legitimate medical purpose.

24 Although the government must prove that at
25 least \$10,000 of the property at issue was criminally

1 derived property, the government does not have to prove
2 that all of the property at issue was criminally derived.

3 Interstate commerce defined. "Interstate
4 commerce" means commerce or travel between one state,
5 territory, or possession of the United States and another
6 state, territory, or possession of the United States,
7 including the District of Columbia.

8 Commerce defined. "Commerce" includes travel,
9 trade, transportation, and communication.

10 Duty to deliberate, verdict form. To reach a
11 verdict, whether it is guilty or not guilty, all of you
12 must agree. Your verdict must be unanimous on each of
13 the four counts of the first superseding indictment.
14 Your deliberations will be secret. You will never have
15 to explain your verdict to anyone.

16 It is your duty to consult with one another
17 and to deliberate in an effort to reach agreement if you
18 can do so. Each of you must decide the case for
19 yourself, but only after an impartial consideration of
20 the evidence with your fellow jurors. During your
21 deliberations, do not hesitate to reexamine your own
22 opinions and change your mind if convinced that you were
23 wrong. But do not give up your honest beliefs as to the
24 weight or effect of the evidence solely because of the
25 opinion of your fellow jurors, or for the mere purpose of

1 returning a verdict.

2 Remember at all times you are judges, judges
3 of the facts. Your duty is to decide whether the
4 government has proved the defendant guilty beyond a
5 reasonable doubt.

6 Any notes that you have taken during this
7 trial are only aids to memory. If your memory should
8 differ from your notes, then you should rely on your
9 memory and not on the notes. The notes are not evidence.
10 A juror who has not taken notes should rely on his or her
11 independent recollection of the evidence and should not
12 be unduly influenced by the notes of other jurors. Notes
13 are not entitled to any greater weight than the
14 recollection or impression of each juror about the
15 testimony.

16 When you go to the jury room, the first thing
17 you should do is select one of your members as your
18 foreperson, who will help to guide your deliberations and
19 will speak for you here in the courtroom.

20 A form of verdict has been prepared for your
21 convenience. The foreperson will write the unanimous
22 answer of the jury in the space provided, either guilty
23 or not guilty. At the conclusion of your deliberations,
24 the foreperson should date and sign the verdict form with
25 his or her initials.

1 During your deliberations, you must not
2 communicate with or provide any information to anyone by
3 any means about this case. You may not use any
4 electronic device or media, such as a telephone, cell
5 phone, smart phone, iPhone, Blackberry, or computer, the
6 Internet, any Internet service, or any text or instant
7 messaging service, or any Internet chat room, blog, or
8 Web site, such as Facebook, MySpace, LinkedIn, YouTube,
9 or Twitter to communicate to anyone any information about
10 this case or to conduct any research about this case
11 until I accept your verdict.

12 If you need to communicate with me during your
13 deliberations, the foreperson should write the message
14 and give it to the court security officer. I will either
15 reply in writing or bring you back into the courtroom to
16 respond to your inquiry.

17 Bear in mind that you are never to reveal to
18 any person, not even to the court, how the jury stands,
19 numerically or otherwise, until after you have reached a
20 unanimous verdict.

21 Signed at Beaumont, Texas, this 30th day of
22 June, 2010, Marcia A. Crone, United States District
23 Judge.

24 And turning to the verdict form.

25 Verdict of the Jury. As to Count 1 of the

1 first superseding indictment, we, the jury, find David A.
2 Vogel, guilty or not guilty.

3 As to Count 2 of the first superseding
4 indictment, we, the jury, find David A. Vogel, guilty or
5 not guilty.

6 As to Count 3 of the first superseding
7 indictment, we, the jury, find David A. Vogel, guilty or
8 not guilty.

9 As to Count 4 of the first superseding
10 indictment, we, the jury, find David A. Vogel, guilty or
11 not guilty.

12 And there is a line for the jury foreperson's
13 initials and the date.

14 At this time we'll have closing argument.

15 MR. COLLINS: Your Honor, before I begin, I
16 just want to confirm with your courtroom deputy which
17 clock she's working from. There's a five-minute
18 difference between the --

19 THE COURT: I know. I have no idea which one.

20 MR. COLLINS: Which one are you going to use?

21 COURTROOM DEPUTY: We'll use that one
22 (indicating).

23 MR. COLLINS: So, it's 10:16?

24 COURTROOM DEPUTY: Yes.

25 MR. COLLINS: May it please the court, members

1 of the jury.

2 Defense counsel in opening statement told you
3 that documents don't fade, and that's an important
4 element of the defense in this case. Well, this is a --
5 it's not often that a defendant maps out his defense
6 strategy seven years before he faces trial, and that
7 document did indeed not fade.

8 Let's look at Exhibit 199, and recall that
9 this is a document that David Vogel wrote to his defense
10 attorney, Doug Grover, about seven years ago about the
11 Clayton Fuchs trial. Mr. Fuchs was indicted for drug
12 distribution over the Internet and ultimately convicted.
13 These are David Vogel's words. "I expect Clayton Fuchs
14 will put on a vigorous defense." And then further, in
15 the middle, "but perhaps a 'Doug Grover' type attorney
16 might make him look like a nice guy that was confused
17 about the law." Does that sound familiar?

18 "Someone who was taking the advice of doctors
19 and degreed professionals" -- does that sound familiar --
20 "who led this young man into uncharted areas, gray
21 areas of the law." Does that sound familiar?

22 (Reading) Clayton Fuchs is nothing more than a
23 drug dealer on the street, and the DEA was too confused.

24 Well, make no mistake, ladies and gentlemen,
25 David A. Vogel is a drug dealer. He's a drug dealer in a

1 lab coat. He's a drug dealer that hired doctors to write
2 invalid prescriptions and push hydrocodone across the
3 country. He's a drug dealer that hired pharmacists to
4 manufacture and distribute those drugs. He's a drug
5 dealer who hired young inexperienced, non-medically
6 trained individuals to work in his operation, the kinds
7 of people that don't ask questions, the kinds of people
8 that follow directions. Does it make sense that someone
9 who was a tanning salon attendant a few years earlier
10 rises to the level of chief executive officer of a
11 multimillion-dollar drug distribution company? Does that
12 make sense that he would choose someone like that to run
13 his operation?

14 What he really wanted to do was he wanted to
15 make money. And he needed doctors and he needed
16 pharmacists to agree with him to distribute hydrocodone
17 over the Internet without a valid doctor/patient
18 relationship; and he said it himself, another document
19 that doesn't fade.

20 Exhibit 51 is an email between Mr. Vogel and
21 Carrie Demers in September of 2006, and this is what he
22 says -- he's talking about a doctor that they should
23 hire -- "This doctor is starving for business and
24 prescribes every opiate imaginable to his pain patients.
25 He is a perfect match for us." That's the sort of

1 organization he wanted to run. That's the business that
2 he was in.

3 But now he wants to play the blame game. He
4 wants to blame everybody. He wants to point the finger
5 of blame at the doctors for not following the protocol.
6 He wants to point the finger of blame at the pharmacists
7 for not following procedures. He wants to point the
8 finger of blame at his employees for not following his
9 rules or doing what he asked them to do. He wants to
10 point the finger of blame at his customers for being
11 addicts. He wants to point the finger of blame at his
12 customers for not providing medical records or for
13 falsifying medical records. At one point he even pointed
14 the finger of blame at one of his customer's earlier
15 doctors who prescribed narcotics to that individual,
16 believing that that is what got that individual addicted
17 and then that individual ultimately becomes a customer of
18 Madison Pain Clinic. He wants to point the finger of
19 blame at his lawyers for their inability to give him a
20 clear written legal opinion that said that he could
21 operate his organization without having his customers
22 come in and see a doctor face-to-face.

23 You heard from a multitude of lawyers, over a
24 ten-year period. Not one of them put in writing that
25 what his organization did was legal. If they did, that

1 would be the first document that you would have seen,
2 "Lawyer X said I could do this." Clearly that didn't
3 happen. Who is he going to blame next?

4 But who reaped the benefit of all this blame?
5 One person, David A. Vogel. David A. Vogel reaped the
6 benefit of his drug enterprise. David A. Vogel reaped
7 the benefit of \$26 million in revenues over a seven-year
8 period. David Vogel reaped the benefit of \$8 million
9 taken out of that enterprise and put directly into his
10 pockets. He took money out of MPC; and he got paid
11 through salaries, he got paid through royalty checks, he
12 got paid through bean count checks. He got paid for
13 every single pill that the Madison Pain Clinic doctors
14 prescribed, 10 cents a pill; and they prescribed millions
15 of pills. And he put that money in his pocket.

16 And what did he do with that money? He bought
17 a 2.2-million-dollar Trump Tower condominium in
18 Manhattan, New York. He bought an expensive rare coin.
19 And don't be distracted. Don't be distracted when
20 defense counsel stands up and says, "David A. Vogel paid
21 his taxes. David A. Vogel had audited financial
22 statements." We've heard those stories before. David A.
23 Vogel isn't the first criminal who has paid his taxes,
24 and David A. Vogel won't be the last criminal who stands
25 behind the fact that he paid his taxes or that he had

1 audited financial statements. That's a distraction. If
2 the underlying business is illegal, it doesn't matter if
3 he paid his taxes or not. You can't distribute drugs
4 over the Internet without a face-to-face doctor/patient
5 relationship.

6 The other thing that David Vogel reaped the
7 benefit of with respect to the Madison Pain Clinic is he
8 treated it like his personal medicine chest. He wore a
9 fanny pack full of drugs; and he popped them like candy,
10 all the time. He sent in explicit and detailed orders to
11 his staff to get drugs for him and his wife. He reaped
12 the benefits.

13 Now, what does it take to establish a
14 conspiracy? You heard the jury instruction. A
15 conspiracy is formed when two or more people work
16 together toward a common goal. That's all it is. And if
17 that common goal is illegal, then the law calls that a
18 conspiracy; and that, in and of itself, is a crime.

19 Recall the newspaper example. Newspaper
20 owner, paper mill manufacturer, editor, reporters, paper
21 delivery boys, truck drivers, all of those people work
22 together to produce a newspaper. They -- not all of them
23 know what each of the others are doing. It's not
24 required that the newspaper boy know exactly what the
25 owner is doing or vice versa, but they're all working

1 together in a concerted action. They're all trying to do
2 the same thing, get that newspaper produced. If the law
3 declared that producing newspapers was illegal, then all
4 those individuals are guilty of conspiracy and they're
5 co-conspirators. It's the same situation you have here.
6 If you decide that sending drugs over the Internet
7 without a face-to-face meeting with doctors is illegal,
8 then the people involved in that organization were
9 illegal.

10 Let's look at -- here are the conspiracy
11 elements from the jury charge.

12 Let's go to the next slide, and let's talk
13 about agreements. You already know that in this case Dr.
14 David Hoblit and Guss Naddaf have agreed that they made
15 an illegal agreement with the defendant to distribute
16 hydrocodone outside the usual course of professional
17 medical practice and not for a legitimate medical reason.

18 In addition to those two agreements, we have
19 these: David Vogel agreed to form the Madison Pain
20 Clinic with Joe Geraci, another individual indicted in
21 this case; but he's fleeing from justice right now.

22 We have David Vogel agrees with pharmacists to
23 distribute compounded hydrocodone, with Eric Fox and Guss
24 Naddaf.

25 David Vogel agrees to recruit starving,

1 down-on-their-luck doctors to write invalid scripts.

2 David Vogel agrees with MPC staff and doctors
3 to disregard the protocol, and David Vogel agrees with
4 the staff not to talk to the DEA. Remember Exhibit 50
5 where David Vogel had every single employee sign a piece
6 of paper that said "Don't talk to the DEA"?

7 Who does that? When you go to work, does
8 someone say, "Don't talk to government agencies, and sign
9 your name. Make a contract with me that you're not going
10 to talk to a government agency." Who does that?
11 Particularly when you're distributing illegal narcotics.

12 Any of these agreements would meet the
13 agreement prong of the case.

14 Let's move on to the next slide. Distribute
15 or dispense, that's one of your elements. Did they
16 distribute or dispense drugs. That's a nondisputed point
17 in this case. Madison Pain Clinic had doctors in Dallas.
18 Those doctors wrote prescriptions. And in the next slide
19 you'll see that not only did you have pharmacists in
20 Houston but you also had pharmacists in Malvern,
21 Pennsylvania, distributing hydrocodone and other
22 narcotics and drugs to essentially every state in the
23 union. Not an issue in dispute.

24 Next slide, please.

25 Controlled substance. The court has already

1 told you as a matter of law that you're instructed that
2 for the purposes of this trial, hydrocodone is a
3 Schedule III controlled substance. So, you don't have to
4 worry whether or not hydrocodone is a drug. Hydrocodone
5 is a drug. You don't have to worry whether or not it was
6 distributed or dispensed. It was distributed and
7 dispensed. Those facts are clear.

8 Next slide, please.

9 Now let's talk about the standard of care.
10 You'll recall that David Vogel and Doug Grover had a
11 conversation about David Vogel's protocol. And I learned
12 something in this trial about this case and this
13 investigation that defense counsel has pointed out has
14 gone on for years.

15 I actually learned something in this trial.
16 Doug Grover told David Vogel, "If you don't follow your
17 protocol, your protocol is going to be Exhibit A in any
18 government prosecution of you for the distribution of
19 drugs." Remember that testimony, "Exhibit A"? It came
20 on the last day.

21 And then I went back and looked at
22 Government's Exhibit 48; and in the title of the document
23 that David Vogel drafted, it actually says "Exhibit A
24 Protocol." That's his words, not ours. I never
25 understood why it said "Exhibit A," but now I do. Doug

1 Grover told him, "If you don't follow your protocol,
2 that's Exhibit A in the prosecution."

3 Well, let's talk about why Doug Grover felt
4 that that was Exhibit A. They didn't follow their
5 protocol, for a number of reasons. They didn't follow
6 the rules with respect to lab results and their urine
7 testing.

8 If you look up at the top, these are just a
9 sampling of documents that came into the case. There are
10 thousands of customer files. This is a sampling. Here's
11 someone who tested positive for marijuana. 20 days
12 later, got the most powerful hydrocodone mix you can get.
13 Here's a person -- Mike Hilbert tested positive for
14 cocaine. I believe he also tested positive for meth and
15 amphetamines. Seven days later, he got the most powerful
16 hydrocodone mix you can ever get. And this guy is from
17 California, never once came in and saw the doctor. None
18 of these people came in to see a doctor.

19 Bowers tested positive for cocaine. 13 days
20 later, powerful 15 milligrams of hydrocodone.

21 Anderson, marijuana, 5/11. Again, just a few
22 days -- 8 days later, 15 milligrams of hydrocodone.

23 They didn't follow their protocol. That's why
24 there's Exhibit A.

25 In addition to that, they didn't follow the

1 rules with respect to mental health status examinations.

2 Remember Kristine Ward and her sister?

3 Kristine Ward was the patient; Kim Ward was the sister.

4 Kim begged MPC in an email not to send drugs to her
5 sister. Her sister was a rising star, a parachutist, a
6 Golden Knight, who ended up going to jail and having lots
7 of subsequent problems because she's admitted she was an
8 addict.

9 Maggie Pepe is their mental health status
10 examiner, a licensed chemical dependency person in
11 New York. Maggie Pepe never saw anyone face-to-face.
12 She talked to about 40 to 50 percent of the candidates on
13 the phone. She never saw anybody face-to-face, and she
14 rarely rejected people. But the one person she did
15 reject, the one person was Kristine Ward. (Reading) seek
16 therapy for her addiction. I would not advise MPC to
17 take this patient. 7 days later, 15 milligram of
18 hydrocodone.

19 And Kristine Ward, the addict, is the same
20 person who prepaid over -- I think she prepaid \$2900
21 because she was going to go bankrupt. So, she gave MPC
22 \$2900 to put on account so she could draw down that
23 account to continue to get narcotics after her
24 bankruptcy. That is distributing drugs outside of the
25 usual course of professional medical practice. It's

1 plain and simple. You can't do that.

2 There are lots of other ways that they
3 distributed drugs outside the usual course of medical
4 practice. Automated refill for narcotics, outside the
5 usual course of professional medical practice. Early
6 refills. You can't get a narcotic and then before your
7 prescription is up go back and get more narcotics.
8 That's not allowed. But we saw testimony that David
9 Vogel himself got almost a thousand pills in a 29-day
10 period. That one event alone is sufficient.

11 Prewriting scripts. We heard testimony from
12 Dr. Hoblit that he rewrote scripts. Not reviewing files
13 and labs, again, outside the usual course of professional
14 medical practice.

15 You had two expert witnesses, two doctors,
16 Dr. Nelson and Dr. Harmer, both of whom came in and
17 unequivocally, beyond a shadow of a doubt, didn't back
18 down from it one bit, in order to establish a standard of
19 care with a patient, a doctor has to see that patient
20 face-to-face. Bottom line, you got to see the patient
21 face-to-face.

22 And you just heard the jury instructions.
23 Count up the number of times about proper
24 patient/physician relationship, establishing contact with
25 the patient, taking a history, all those things that

1 occur in a usual doctor/patient relationship. Every
2 single person in this room has seen the doctor. You're
3 all experts in this.

4 Think about the first time you went to that
5 new doctor. You went to that doctor's office. You
6 filled out a form. You waited, maybe a long time.
7 Finally the doctor came in, and she or he sat down and
8 asked you questions, "How are you doing, how are you
9 feeling, how old are you, what's your family life, what's
10 your social life like, where does it hurt, what's
11 bothering you?" And then what did they do? They laid
12 hands on you. They laid hands on you.

13 No doctor at MPC laid hands on customers
14 before they gave them prescriptions for highly addictive
15 narcotics. That's the bottom line. They did not do
16 that. You had two experts come in here and tell you that
17 that's what was supposed to happen.

18 Now, you'll recall that --

19 Go to the next slide, please.

20 You'll recall that David Vogel's defense is
21 that he was confused, that he doesn't understand the law.
22 He wants you to believe that documents don't fade and he
23 has plenty of emails to his employees saying, "I want to
24 follow the law. I want to follow the law. Follow my
25 protocol," which of course they didn't follow. Well,

1 let's look at David Vogel's own words that prove what he
2 knew and when he knew it; and you'll see that he knows a
3 doctor/patient relationship, face-to-face is what he
4 needs to do.

5 And let's start before Madison Pain Clinic
6 even kicks off. August, 2000 -- this is Exhibit 140 and
7 if you -- it's Page No. 26 on Exhibit 140. August, 2000,
8 private placement memorandum. Let me tell you what a
9 private placement memorandum is. You know that
10 businesses can raise money in lots of ways. You hear
11 about stocks; you hear about bonds. Well, sometimes
12 people will take a new business idea to a group of
13 wealthy people and ask them for money. That's called a
14 "private placement." That's what this is. David Vogel
15 wrote a document, took it to wealthy people and asked
16 them if they would give him money. This was an important
17 document for David Vogel. David Vogel has to get this
18 right. David Vogel is laying on the line what this
19 business is going to be. Let's see if he gets the law
20 right.

21 "Unfortunately, based on the advice of counsel
22 and other professionals, from a business standpoint, we
23 must operate in a different manner. Z-Best will require
24 that initially any consumer that gets prescribed
25 medication be evaluated in-person by our affiliate

1 Madison Pain Diagnostic Services," Madison Pain Clinic,
2 MPC. He got the law right when it mattered. He got the
3 law right when he needed money. There's no gray area.

4 (Reading) Z-Best Pharmacy will market in much
5 of the same manner as Pillbox or Friendly -- those are
6 two other Internet-based pharmacies -- except that under
7 no circumstances will patients get an initial
8 prescription without an in-person diagnostic exam with
9 Madison and a consultation with a Madison-affiliated
10 doctor.

11 Again, a Madison doctor, face-to-face physical
12 exam.

13 "Simply speaking, the practice of prescribing
14 narcotics on the telephone without an initial in-person
15 consultation could lead to serious legal trouble for all
16 involved."

17 David Vogel got it right. He got it right in
18 August, 2000, at the beginning of this whole charade.

19 Exhibit 180, David Vogel's own words. In a
20 2001 letter from David Vogel to Attorney Mike Cooper --
21 you remember, Attorney Mike Cooper came in. David Vogel,
22 (Reading) personally, I think the thing to do is to have
23 our doctors see each patient in person. He put it in all
24 caps. (Reading) that means the patient will have to
25 travel a long way to see us.

1 Exhibit 141, a May, 2001, eZine. An eZine is
2 an online magazine. This is David Vogel advertising to
3 his potential customer base, in his own words, (reading)
4 please note that recently two major Internet pharmacies
5 were closed down. These pharmacies simply required a
6 five-minute consult with a doctor on the telephone to get
7 usually 100 pain pills per month. All caps.

8 (Reading) we do not operate that way. You
9 will be screened. You will need to see us in person.
10 However, once you come in and get examined by our doctor
11 and psychologist, you can have your meds shipped to you
12 monthly. The cost of an airline ticket is about \$200 or
13 so.

14 Exhibit 145, May, 2001, email from David Vogel
15 to his co-investor Joe Geraci. (Reading) clients need to
16 come in. In other words, scare people into coming to
17 Dallas to be a legit client. A client can come to Dallas
18 in the morning and return in the eve, no big deal.

19 Those are David Vogel's words early, 2000,
20 2001. He knew what the rules were. They weren't gray.

21 Let's talk about lawyers' words. Again, that
22 August, 2000, private placement memorandum, that's early
23 in the process. We've heard from some lawyers. There
24 was a lawyer even before the August, 2000, private
25 placement, an unknown lawyer, an unnamed lawyer. But

1 David Vogel says in this document, (reading) based on the
2 advice of counsel, Z-Best will require that initially any
3 consumer that gets prescribed medications be evaluated in
4 person. That's one lawyer who told him that. Prior to
5 the August, 2000, private placement memorandum. Again,
6 when he had to get it right, when he was raising money,
7 he knew what the rules were.

8 Then he has a conversation with Michael
9 Cooper. You saw Michael Cooper. He was in the
10 courtroom. Exhibit 180 is a January, 2001, letter from
11 David Vogel to Michael Cooper where he poses the
12 question. Question from David Vogel: If a patient
13 cannot physically come in, as an alternative, can we have
14 a doctor or RN give a patient a physical at his house out
15 of state; and based on that physical, can the local
16 doctor issue a prescription?

17 So, he's asking his lawyer, "Hey, if they're
18 not in Texas, if they're out of state, if they can't come
19 in, can I have somebody out of state examine that person
20 and then can my doctor in Texas prescribe that
21 prescription, write that prescription?"

22 Here's Michael Cooper's answer in Exhibit 183
23 in paragraph 4: All patients shall be seen for their
24 initial consultation by a physician in the facility.

25 He hired Michael Cooper to evaluate the

1 business model. Michael Cooper looked at the law,
2 Michael Cooper told him what the assumptions were.
3 Michael Cooper talked to him. Michael Cooper told you
4 and other lawyers told you, "Look, we don't know the
5 facts. We relied upon David Vogel to get the facts.
6 David Vogel told me the facts. I went and looked at the
7 law and I concluded that the law -- that I'm going to
8 make the assumption that all patients have to be seen in
9 the facility in order to give my opinion and I gave him
10 that opinion." David Vogel knew in 2001 based on the
11 conversation with Michael Cooper.

12 Let's look at Exhibit 184, November, 2001,
13 letter from Michael Cooper to David Vogel. Just in case
14 you think David Vogel didn't get it the first time.
15 Michael Cooper writes him and says: All patients shall
16 be seen for their initial consultation by a physician in
17 the facility. It is my understanding that a substantial
18 number of patients are not seen by a physician in the
19 facility. It's my further understanding that any
20 prescriptions for those patients not seen by a physician
21 in the facility are filled via telephone, mail order,
22 and/or Internet transactions.

23 Michael Cooper is putting him on notice right
24 there in 2001.

25 (Reading) based upon the foregoing, you may

1 not rely upon the guidance expressed in the letter so
2 long as you operate out of compliance.

3 Michael Cooper is telling him you got to have
4 a face-to-face.

5 Exhibit 198, December, 2003. This is a 2003
6 email exchange between David Vogel and Douglas Grover,
7 another lawyer. In the email, David Vogel admits that
8 Doug Grover told David Vogel that face-to-face exams are
9 required. Additionally, David Vogel shows that he
10 understands what a real physical exam is. You may
11 remember this exhibit from testimony. It's Exhibit 198.
12 This is David Vogel writing (reading) the new protocol
13 that I, David Vogel, suggest is based on your, Doug
14 Grover, recommendation that we add a face-to-face visit
15 to our current protocol.

16 This is 2003.

17 (Reading) then the doctor gets the file and
18 talks with the client.

19 That's what used to happen.

20 Now David suggests (reading) this talk will be
21 replaced with a face-to-face visit. The doctor, during
22 that visit, would check the patient's eyes, nose, ears,
23 mouth, lungs, heart, stomach, genitals, and do a
24 proctological examination, look at the patient's toes,
25 and also feel around the hurt areas of the patient.

1 David Vogel knows what the standard of care
2 is. That's how you do it. Someone lays hands on you and
3 tries to figure out where and why it hurts, in person.
4 David Vogel knew that in 2003; David Vogel didn't do it.

5 You'll recall Doug Grover's testimony from the
6 stand. He says in -- in December, 2003, Grover responds
7 to David Vogel's emails and links referencing Texas law
8 and DEA regulations. David Vogel sends Doug Grover some
9 information. Grover says that Texas law and DEA
10 regulations suggest to him that a phone conference with a
11 doctor is inadequate and that that cannot create a
12 doctor/patient relationship.

13 And, again, Exhibit 2005 *[sic]*, you'll recall
14 that while testifying, Doug Grover repeatedly denied ever
15 seeing Michael Cooper's legal opinion about a
16 face-to-face relationship. But on cross-examination,
17 Ms. Smith got him to admit that -- Grover stated that "I
18 do remember seeing Cooper's letter from April 20th, 2001,
19 that all patients should be seen for their initial
20 consultation by a physician in the facility." The
21 doctors *[sic]* are telling him.

22 197, the last lawyer, Susan Henricks -- I'm
23 sorry. I said "doctors." I meant "lawyers." The
24 lawyers are telling him.

25 And our last lawyer, Susan Henricks,

1 Exhibit 197, this is Jonathan Vogel, charged in this case
2 and a co-conspirator in this case with Mr. David Vogel.
3 He's talking about a conversation he had with Susan
4 Henricks. (Reading) I will ask her to give us a written
5 opinion; but from speaking with her earlier, she already
6 stated that her opinion is not law and that her opinion
7 is not necessarily indicative of anything, unfortunately.
8 Very blatantly putting it, after speaking with her, she
9 has no definitive answers for me. She did state that in
10 her opinion if we did have every patient come into our
11 clinic for an examination with our in-house physician,
12 that the in-house examination should establish the
13 doctor/patient relationship. Susan Henricks, 2007.

14 Now, do not be persuaded by deliberate
15 ignorance. You got an instruction on deliberate
16 ignorance, "You may find that the defendant had knowledge
17 of a fact if you find that the defendant deliberately
18 closed his eyes to what would otherwise have been obvious
19 to him." You can't get away with closing your eyes when
20 the truth is right there.

21 We just went through -- David Vogel knew the
22 law, in his own words. The lawyers told him about how
23 important the face-to-face is. Let's look at some other
24 roadblocks or areas in which he learned this information.

25 Why is it if David Vogel is getting it right,

1 if David Vogel -- if the law is so unclear, why is it
2 that everyone who worked with him shot him down?

3 Remember Mark Sullivan from the Good's
4 Pharmacy? Mark Sullivan came in and said that when he
5 learned that MPC was not doing a face-to-face, that that
6 was the last day that Good's Pharmacy would ever work
7 with him.

8 Remember Warren Craig from Custom Compounding
9 Center in Little Rock, Arkansas, who made a surprise
10 visit to Madison Pain Clinic, showed up one morning,
11 because he had seen a large number of narcotic scripts
12 and started to get worried about it?

13 Well, he walked into the office. And what did
14 he see? He saw old Dr. Sam sitting in the back room with
15 a stack of files, a prescription pad, and a glass of
16 Scotch at 9:30 in the morning.

17 What did Warren Craig do? "Can I borrow your
18 phone?"

19 "I called my partners and said, 'Stop right
20 now. We're cutting them off.'"

21 Why is it that everyone who is affiliated with
22 Madison Pain Clinic feels the need to lie?

23 PayPal drops them. PayPal gives them three
24 letters -- November, 2003; August, 2004; and January,
25 2005 -- every single time saying, "Hey, hey, tell us

1 about the doctor/patient relationship. We need
2 documentation. And give us the license for your
3 pharmacy." Three different times in letters. PayPal was
4 important to Madison Pain Clinic. \$11 million worth of
5 payments were processed through PayPal.

6 What did Madison Pain Clinic do? Nothing.
7 They allowed themselves to be dropped.

8 I asked Tyra Barnett why? She said, "We
9 didn't have documentation. We didn't see patients.
10 Dr. Sam didn't see anybody in the year I was there.
11 Dr. Fabi didn't see really anybody, maybe one.
12 Dr. Watson, she saw maybe five in a year." And they
13 wrote maybe 750 prescriptions. They didn't have the
14 documentation.

15 What about CTS Holdings? Once PayPal dropped
16 Madison Pain Clinic, they have to figure out a way to get
17 paid. So, they go to CTS Holdings. CTS Holdings has an
18 application. Madison Pain Clinic lies on it, says, "We
19 do zero percent Internet business. Zero percent. We
20 have a physical location. We have merchandise on-site."

21 They try to get payments with Discover card.
22 They lie on that application. They gave the impression
23 they were a brick-and-mortar facility. They said they
24 had a cash register -- they answered "yes" to cash
25 register -- that they had merchandise on stock. They

1 didn't list their Web site on the address.

2 Look at the Medisca applications. People
3 involved with Madison Pain Clinic had to lie. Medisca is
4 a drug wholesaler, sells bulk hydrocodone to the
5 pharmacies. Pharmacies use that to make the compounded
6 hydrocodone to sell. Eric Fox lied on his application.
7 Jack Munn lied on his application. Everybody who was
8 associated with Madison Pain Clinic had to lie or -- if
9 they were employees. Or if they were business partners,
10 they ended up dropping them.

11 Let's quickly turn to the money laundering
12 counts. These are essentially undisputed. If you find
13 that Madison Pain Clinic issued invalid prescriptions
14 because they were issued not in the usual course of
15 professional medical practice or not for a legitimate
16 medical purpose, you're essentially done in this case
17 because they didn't dispute the fact that they had
18 proceeds and those proceeds were used to pay doctors,
19 they were used to pay pharmacists, they were used to put
20 ads on drugbuyers.com to solicit more drug users and
21 complete that cycle. That's promotional money
22 laundering. When you use the money, when you use the
23 profits from what you earn from your unlawful activity to
24 grow and feed that business, that's promotional money
25 laundering. That's Count 2.

1 Let's look at Count 3 and Count 4. When you
2 take profits out of your business, when you take profits
3 out of your business and you use them to buy other
4 things, that's a different kind of money laundering. And
5 in this case David Vogel took money out of that cookie
6 jar. It was his jar. It was his cookies. But if those
7 cookies are illegal cookies, then we got a problem -- and
8 that's our point. All right -- if that jar is filled
9 with illegal cookies, it's filled with the money from an
10 illegal activity. He used it to buy a 37,000-dollar rare
11 coin, he used it to buy a 2.2-million-dollar Trump condo;
12 and that's money laundering. When you take money out and
13 you use it to buy big items, that's a form of money
14 laundering.

15 So, I just bring you back -- as I sit down and
16 yield my time, I bring you back to David Vogel prepared
17 his defense years in advance. Exhibit 199a. So, as you
18 hear his counsel talk about what he did and why he did it
19 and the guidance that he gave his staff -- he told his
20 employees that they must comply, they must follow the
21 protocol; he relied upon what doctors told him; he relied
22 upon what lawyers told him; he said that the law was
23 gray; and at worst, he was simply confused -- does that
24 sound familiar? It's the same defense he laid out for
25 another drug dealer prescribing drugs over the Internet.

1 Thank you.

2 THE COURT: All right. We're going to take a
3 recess, 15 minutes.

4 (Recess, 10:52 a.m. to 11:09 a.m.)

5 (Open court, defendant and jury present)

6 MR. BRETT SMITH: If it pleases the court,
7 counsel for the government, ladies and gentlemen.

8 First of all, I want to slow it down just a
9 notch here. I want to thank each and every one of you.
10 Thomas Jefferson is often quoted, "Second only to service
11 for your country in a time of war, the highest duty that
12 a citizen can perform is to serve on a jury." I want to
13 thank each and every one of you.

14 I'm coming up on about my 80th jury trial, and
15 I've rarely seen juries as attentive as y'all. You've
16 taken notes, and you've paid attention. You even stayed
17 awake during the indictment and the charge, and that says
18 a lot. I want to thank each and every one of you.

19 Each one of you will be able to filter through
20 the evidence in this case to get to the truth to
21 determine if the government has proven this case beyond a
22 reasonable doubt. The government has the burden of proof
23 here. David Vogel has to do nothing. Use your common
24 sense.

25 Does the evidence in this case convince you in

1 your head, your heart, or your gut that David Vogel has
2 been proven guilty beyond -- beyond -- a reasonable
3 doubt? Each and every element of this case.

4 My co-counsel will go through the other
5 evidence in this case and I think he'll focus on the lack
6 of evidence surrounding David's acts and intents, but I
7 want to focus on something different.

8 As you sit around this 4th of July weekend
9 watching NASCAR or hitting your favorite fishing hole or
10 spending time with your grandkids watching fireworks,
11 let's remember what the 4th of July is about. The very
12 first 4th of July celebration was in 1820 in Eastport,
13 Maine. It was to celebrate independence. Independence
14 from what? Oppressive government. Celebration of
15 constitutional rights. We were celebrating our freedom
16 from the British crown. Celebrating rights like the
17 right to have a jury trial. There's only 12 people that
18 can stop the power of the government, and the 12 people
19 are sitting in that box. The rights to confront and
20 cross-examine your accusers and the constitutional rights
21 to call witnesses on your own behalf, that's what we
22 celebrate on the 4th of July. And I want to tie that in
23 because I want to talk about what this case is about and
24 what this case is not about.

25 The government told you in opening that

1 Madison was a click-and-pop operation. That's not what
2 this case is about. The government has attempted at
3 every turn of the corner to paint a different picture of
4 Madison Pain Clinic, the protocol, and David Vogel; and
5 they have overreached on every occasion. They even
6 overreached this morning.

7 You were told in their closing that Joe Geraci
8 was a fugitive. Well, he is. But did you hear any
9 evidence of that during trial? You did not. But they
10 threw it in there. They threw it in there because they
11 want you to hear it. It wasn't presented in evidence and
12 it's not supposed to be mentioned in closing, but they
13 did it anyway because they want to stick it out there.
14 Let's reach over the bar one more time.

15 How else have they reached over the bar in
16 this case?

17 Every time they presented a witness, the
18 witness would get on the stand for the government and he
19 would try to paint a version of the truth. And then what
20 did you find on cross-examination? When David Vogel
21 exercised his constitutional rights to cross-examine
22 witnesses, what did you find?

23 For the first time, we found out that the
24 government had made numerous attempts to buy from Madison
25 Pain Clinic and they all failed, but they didn't tell you

1 that on direct. They wanted to paint a different
2 picture. They never told you about the assumed names of
3 a Dimitri Reynolds or Mary Martinez or the twice-rejected
4 Chris Gattis. They never told you about that because
5 they didn't want you to know. We learned about those
6 failed attempts during cross-examination.

7 When the government was finally successful,
8 they acknowledged that they filled out a lengthy
9 questionnaire; but they never told you the steps that
10 Agent Fairbanks went. It was through cross-examination,
11 that constitutional right of Mr. Vogel's, that we found
12 that Fairbanks went to the DPS and got a driver's
13 license, just like you and I would do, with his real
14 picture. He got through DEA and got a fake Social
15 Security card. They submitted fictitious medical
16 records. He got a UA and a blood test. And guess what
17 he found out? Did you notice his surprise? He's got
18 high cholesterol. Do you think that was treated before
19 he went to the Madison Pain Clinic? I doubt it. I think
20 they were the first people who diagnosed it. A good
21 example of diagnostic services being offered.

22 They went through a lot of steps in this case
23 after they finally figured out how to break the protocol,
24 but they never told you how they figured it out, because
25 they tried and tried and tried. Despite those attempts,

1 there was evidence supporting the staff and the doctors
2 were trying to comply with the protocol.

3 Now, we'll do something different than the
4 government. I'll acknowledge the protocol was violated.
5 We're not going to stand here and argue that it wasn't.
6 The protocol was violated. Dr. Hoblit violated the
7 protocol, but it certainly was not violated by David
8 Vogel.

9 Regarding those successful hydrocodone
10 purchases in 2007, they were all done through Dr. Hoblit.
11 Arguably, at the end Dr. Hoblit was getting sloppy.
12 Dr. Hoblit has been indicted, and he's paying for what he
13 did. Dr. Hoblit wrote the prescriptions. Dr. Samblanet
14 wrote the prescriptions. Dr. Fabi wrote the
15 prescriptions. Those doctors are responsible for the
16 ordinary course and usual custom of medicine. They
17 violated those protocols, not David Vogel. And the
18 government has not proven otherwise.

19 They wanted to have you believe, through
20 Special Agent Fairbanks, that he just went in and
21 somebody drew his blood. Well, what did you find out
22 through the constitutional exercise of cross-examination?
23 That it was actually a phlebotomist, that, yeah, maybe
24 she did have some medical training. Maybe she did, but
25 they didn't want you to know that.

1 And they also tried to make you believe -- the
2 government presents their case and they want to --
3 present to you through their witnesses that no doctor was
4 a pain specialist. Well, what do you find out when
5 Mr. Vogel exercises his constitutional right of
6 cross-examination? One of the doctors had worked at
7 K Clinic in pain management for ten years, and another
8 doctor was an internist in Dallas who makes the talk show
9 circuit. They didn't want you to know that on direct.

10 We learned through cross-examination, not on
11 direct, that doctors licensed in one state could
12 prescribe medications in another state under certain
13 state exemptions. They didn't tell you that. They
14 didn't tell you that.

15 Now, they want to point the finger of blame,
16 point the finger of blame. Well, you know what happens
17 when you point your finger at somebody? You've got three
18 pointing back at you. Let's point the finger of blame
19 over here for a minute.

20 They told you on direct, through their
21 witnesses that they want you to believe -- let's take
22 this jury through the blinders -- we didn't start our
23 investigation until 2006. That was not true and they are
24 overreaching and they want to mislead you.

25 We learned through the constitutional exercise

1 of cross-examination that this investigation -- that the
2 DEA was getting tips about Madison Pain Clinic in 2002,
3 in 2003, in 2004, in 2005. And what they want you to
4 believe is that the entire United States Federal
5 Government and the United States Drug Enforcement Agency
6 was too busy. They didn't have time to come knock on the
7 door. Well, they've got time now to have an army of
8 United States attorneys and an army of investigators and
9 army with the DEA and the IRS to sit here and prosecute
10 David Vogel, but they did not have the time, for five
11 years, to knock on his door and enter into a memorandum
12 of understanding like they did with Eric Fox. They want
13 you to believe they did not have time to do that. Let's
14 point the finger of blame. They knew about Madison Pain
15 Clinic in 2002, and they could have done something then.
16 Point the finger of blame.

17 And let's put this in context, ladies and
18 gentlemen. Let's put it in context of the fact that they
19 went to Eric Fox. They'll make hay out of the people who
20 quit doing business with Madison, but they don't want you
21 to know -- they want to put little blinders on -- they
22 don't want you to know what really happened with Eric
23 Fox. Eric Fox was never indicted, never charged. The
24 single largest compounding pharmacy to provide
25 hydrocodone for the Madison Pain Clinic, three times the

1 number that Guss Naddaf did, Eric Fox has never been
2 prosecuted, but "Hey, stay tuned. Keep the radio on.
3 Stay tuned. Yeah, yeah. We'll get there. We'll get
4 there. Stay tuned." They never prosecuted him.

5 What did they do with Eric Fox? They went to
6 him and they knocked on his door and they said, "Hey, we
7 don't like what you're doing. We think what you're doing
8 is inappropriate with some of these pharmacies, and we
9 want you to stop."

10 So, what does the DEA do? They sign a letter;
11 Eric Fox signs a letter. It's called a "memorandum of
12 understanding."

13 Well, what did Eric Fox do? He turned right
14 around and kept shipping drugs, and they never prosecuted
15 him.

16 Put it in context about what the DEA knows and
17 what the government knew and point the finger of blame
18 back here because Douglas Grover wrote a letter in August
19 of 2003 to the director or chief of the diversion and
20 liaison division of the Drug Enforcement Administration
21 and said, "Hey, this is what my client is doing" and he
22 set out the protocol. He didn't identify his client.
23 That's not what an attorney does.

24 Not only did they get the letter but they sent
25 it again because the DEA called and said, "Hey, we lost

1 the signature page." So, he sends it again.

2 All the government had to do, instead of
3 pointing the finger at David Vogel, was pick up the phone
4 and call Mr. Vogel, "We got your letter. We've reviewed
5 the protocol" and "we don't approve" or "we do approve."
6 That's all they had to do.

7 Or they could have typed out a letter and sent
8 it back to Mr. Grover and he could have advised his
9 client, but they never did that. So, they want you to
10 point the finger at David. Point the finger of blame at
11 the government. They had every opportunity to shut this
12 down and stop it early on or to go to David and say,
13 "Look" -- I mean, that's what David was asking for the
14 whole time, an opinion, "Let me know." I believe my
15 co-counsel is going to explain to you, from Ryan Haight
16 back until 2001, what really happened and why the law was
17 not clear. They were too busy. They were just too busy.

18 Now, what this case is not about. This is not
19 the badest man in the world. This is David Vogel. The
20 government will overreach so much so that they want to
21 bring in a four-time convicted felon, an international
22 drug conspirator who brings in ephedrine from China by
23 the hundreds of kilos to put hundreds of pounds of
24 crystal methamphetamine on the streets of this state or
25 country. They cut him a deal once, and they're going to

1 cut a second deal for him to come in and tell you that
2 David Vogel is the badest guy he's ever met. It's
3 fiction, and they're overreaching.

4 There was no click-and-pop operation. There
5 were over 4,000 patients in 6 years. They brought you 3
6 addicts, and 5 or 6 dirty UAs. That's it.

7 Protocol violated? They did. It happened.
8 The protocol was violated. No doubt about it.

9 4,000 patients, 3 drug addicts, and 5 or 6
10 dirty UAs, that's what they brought you.

11 We learned on cross-examination that Kristine
12 Ward was already on methadone and hydrocodone from the
13 military doctors and that she was getting her drugs from
14 three other online pharmacies; but she told you Madison
15 was different, it was harder and they required her to
16 follow the protocol. She also told you she would have
17 gotten her meds no matter what. She was getting it from
18 doctors; she was getting it off the streets.

19 Danny Dickens came in; and they wanted you, on
20 direct examination, to believe he was heavily addicted
21 and he had to go to shock therapy because of the Madison
22 Pain Clinic. But what did we learn on the constitutional
23 exercising of cross-examination? That Danny Dickens was
24 already heavily addicted and he was getting all the
25 fentanyl and Valium and drugs he needed from Dr. Jones.

1 That was the truth.

2 Through the constitutional right of David
3 Vogel to call witnesses on his own behalf, we learned
4 that Roy Heuss, Victoria Northrop, and Doug Cummins --
5 that Madison Pain Clinic serves a legitimate and
6 necessary purpose in helping patients with severe chronic
7 pain. Those, I propose to you, are the real Madison Pain
8 Clinic patients.

9 It was through a protected and legitimate
10 opiate therapy program that these people got help. We
11 learned about their dosing, that some of them were taking
12 six and seven pills a day. That's 160 pills a month, and
13 that's what they needed to get by.

14 We learned about the chilling effect that the
15 DEA has on medical professionals that treat people with
16 pain.

17 Now, I'm going to try to wrap this up quickly;
18 but I want to talk to you about Counts 2, 3, and 4,
19 money laundering. I hope you got where I was going with
20 Dana Bracy, about the Organized Crime Drug Enforcement
21 Task Force at 600 East Commerce, because I'm quite
22 familiar with it because they work gang enforcement and
23 drugs, like the Jamaican Shower Posse or the Mexican
24 prison gangs.

25 If you follow a money launderer, they don't

1 often launder their money through the Internal Revenue
2 Service. And there was a paper trail from 2000 with the
3 Secretary of State for The Hamilton Agency. So, it
4 wasn't real hard for Dana Bracy to go in and figure this
5 out. In 2000 they were filing tax returns on The
6 Hamilton Agency for Internet drug sales and they were
7 listing their income and David Vogel was filing his tax
8 returns in 2001. Through the entire period of this
9 conspiracy, through certified copies of the United States
10 Internal Revenue Service, we see that David Vogel again
11 has been filing his taxes. He's paying taxes on a W-2
12 from The Hamilton Agency. He's paying taxes on a K-1.
13 That's the dividends he got. He funneled all his money
14 through the Internal Revenue Service. That's not money
15 laundering. That's being a taxpayer. It's not money
16 laundering. How hard was it for the IRS to figure out
17 that paper trail?

18 I don't care if you work as an educator,
19 you're in agriculture, you're an equipment operator, you
20 work in finance or construction, an administrator, in
21 food service, or a custodian or a homemaker -- it doesn't
22 matter what you do -- none of you left your common sense
23 at the footsteps of this courthouse. And I think all of
24 you can see through the government's attempts in this
25 case to reach over and get David Vogel. And they've got

1 a lot of reasons to do it. They want to distort the
2 truth. They want to present to you a different version
3 of the facts, and they want to overreach. They want to
4 overreach so much that they'll take a fine, distinguished
5 federal prosecutor like Doug Grover and try to accuse him
6 of committing a crime because he accepted hydrocodone
7 from a patient to test it in a lab; and they want to try
8 to say, "You're part of the conspiracy. You violated
9 Title 21, Section 841." That's overreaching on their
10 part, and they've done it every step of the way.

11 The truth be told, ladies and gentlemen, the
12 hardest part of this trial has yet to come; and the most
13 difficult job anyone has in this trial is the job the 12
14 of you will have when you go back in that jury room. And
15 I anticipate that you'll deliberate and render the
16 rightful and just verdict.

17 MR. SCOTT SMITH: Well, here we are. And
18 thankfully, you've got it all figured out, right? It's
19 so clear. It's all right there for you, the law, very
20 clearly set forth.

21 I told you in opening, I told you in voir dire
22 that I was going to mention three times the burden of
23 proof; and this is the third. The burden of proof that
24 the government has to bear is to prove their case beyond
25 a reasonable doubt, and I told you -- I think it was in

1 voir dire -- that innocence is not your job. I'll tell
2 you, innocence has no place in a criminal trial because
3 that's not what this is about.

4 You're not expected to figure out whether he's
5 guilty or innocent. Your job, your oath is to find
6 whether he is guilty, meaning the government has proved
7 their case beyond a reasonable doubt, or not guilty.

8 Now, not guilty may well be innocence. Not
9 guilty may mean you think it happened but you don't know.
10 And in federal court, fortunately, you're given a
11 definition; and it really helps. It's in the charge.

12 "Reasonable doubt is a doubt based upon reason
13 and common sense after careful and impartial
14 consideration of all the evidence in the case." And more
15 importantly, "proof beyond a reasonable doubt, therefore,
16 is proof of such a convincing character that you would be
17 willing to rely and act upon it without hesitation in the
18 most important of your own affairs." So, let's put that
19 in context.

20 How would you gauge that?

21 I think most of us would agree the most
22 important of our own affairs are the health and safety of
23 our loved ones. Think about it. If you're asking to
24 decide whether your wife or your son or your daughter or
25 your grandchild is going to have surgery and it depended

1 on whether you believed the government had proved this
2 case beyond a reasonable doubt, would you hesitate?
3 Would you hesitate?

4 And if you do, that is reasonable doubt.
5 Simply hesitating. Not that you would ultimately go one
6 way or the other; but if you would stop and go (verbally
7 indicating) "I don't know about this," if you hesitate,
8 you've got reasonable doubt.

9 And I'll tell you, the defense didn't have to
10 do anything. We've got 150 exhibits that we brought to
11 you. We didn't go through them all. Okay? We did not
12 go through them all. This case went a lot shorter than
13 we thought and there's a lot of stuff in those exhibits
14 that you haven't seen, but they're in evidence. And what
15 we tried to do is make them chronological so that you
16 could see the passage of time. As they move towards the
17 Ryan Haight Act, you can see the things they talk about.
18 These face-to-face visits became a dialogue that they
19 were engaging in. "We've got to get ready for Ryan
20 Haight. It's coming. It's coming." And you heard from
21 Joel Dunn, it came in 2009. And when they talk about
22 face-to-face, that dialogue is moving towards Ryan Haight
23 compliance. You can see it in the correspondence.

24 And if you want to look at some patient files,
25 that stack there on the end of the table are all in

1 evidence. If you want to look at them, there's Roy
2 Heuss' file; there's Virginia Northrop's file. There's
3 about nine or ten others that you can look at and see
4 what's in there. You're welcome to them. All you have
5 to do is ask for the exhibits, and they're going to be in
6 the jury room.

7 And let me say this. Obviously, I get worked
8 up. And if there's something that we've done that you
9 don't like, put it on us. Okay? Because don't hold him
10 responsible for something you don't like that we did.
11 Okay? It's not his fault.

12 In opening the government said, "All you need
13 is an Internet and a credit card and you get pills."
14 Now, come on. You sat here for seven days, and you know
15 that's wrong. Why would they tell you that? And what
16 witness told you that? Ray Robinson, the meth dealer.
17 Now, there is a drug dealer. He's a real drug dealer.
18 That's what they should be doing.

19 And I'll tell you, when they talked about
20 Clayton Fuchs, that was a click-and-pop. You heard me
21 say that word a bunch of times in this trial. Because
22 when Agent Dunn testified, he said all the other ones
23 that we talked about -- the Pillbox, Clayton Fuchs --
24 those are click-and-pops. You click the computer; you
25 get your pills.

1 This was a vastly different organization.
2 They had seven, eight steps, including consultation with
3 the physician. It was not a click-and-pop. And when you
4 saw that first exhibit they put up on the board where
5 David is talking with his attorney in 2000, mind you, and
6 they say, "Well, he was plotting a strategy," no, he was
7 getting ready to cooperate with the government to testify
8 against Clayton Fuchs. That's what he was talking about.
9 He was going to cooperate with the government because he
10 was so disgusted with the way Clayton Fuchs did business.
11 "We will never be a click-and-pop." You'll see it in all
12 those exhibits. "We insist on compliance." Compliance,
13 compliance, compliance. You heard it a hundred times.

14 And why is that important? Because it's not
15 whether the doctors made a mistake. We got to get in
16 this man's head to find him guilty. You've got to
17 believe he intended to violate the law. So, that's why
18 compliance, compliance, compliance is -- we showed you
19 over and over again in the paper trail.

20 Now, it sounds like I hate the DEA. I don't.
21 These are good people. And God bless them on the border
22 doing their job trying to keep drugs from coming across
23 the border. But, you know, when we asked you in voir
24 dire -- I said, "You know, we all have life experiences
25 that affect how we see a case." And you got to talk

1 about some things maybe you weren't comfortable with.
2 Well, I keep thinking of The Sixth Sense, that movie, and
3 what he keeps saying, "I see dead people. I see dead
4 people."

5 Well, the DEA sees bad people; and it's just
6 part of their job. They deal with bad people day-in
7 day-out, day-in day-out. So, everybody they see is bad
8 to them. That's the way they think. They're not
9 objective. Joel Dunn could never sit on this jury,
10 never. And, so, they try to make everything sound bad.

11 My brother talked about overreaching. Well,
12 "You mean somebody else picked up your prescription?" We
13 all do that. There is nothing wrong with that. But they
14 make it sound like it's a violation of some federal law.
15 My brother mentioned Doug Grover. He gets on the stand
16 and says, "We were testing the medicine to make sure the
17 pharmacy was getting it right." How much more good faith
18 do you need? And, so, they turn around and they try to
19 chase him down a track that "You're violating the law."

20 Again, I'm a fan of the DEA; but obviously you
21 think I may have some issues with them in this case.
22 Instead of skulking around picking up trash for two and a
23 half years, why didn't they just answer the question?
24 Why didn't they answer the question asked of them in 2003
25 by Doug Grover?

1 And what question is it? Well, it's the
2 64,000-dollar question that nobody has yet answered: May
3 a physician prescribe opiates without personally
4 conducting a physical examination?

5 Instead of spending two and a half years of
6 man hours trying to build a case, just answer the
7 question.

8 Nothing David Vogel did was under a blanket.
9 He filed his returns. He told everybody, "This is our
10 protocol." And he had his lawyer raise his hand up
11 high -- now, admittedly, it was anonymous -- but he said,
12 "This is what we're doing. This is what we're doing."
13 And they sent it to the DEA. And why did Doug Grover do
14 that? Because David Vogel asked him to do it. Intent.
15 If you're going to violate the law, do you direct your
16 attorney to send something to the DEA?

17 And Doug Grover said something else. David
18 Vogel came to him and said, "let's go to the courts.
19 Let's ask a judge to tell us if this is right or wrong."
20 So, Grover sends one of his associates out and they
21 research it and they say, "Can't do it. No procedure."

22 If you are intending to violate the law, you
23 don't think about going to court and asking a judge. You
24 don't do that. Getting in his head, and it's just not
25 there. The intent is not there.

1 And it must be willful. Willfulness is an
2 element in all counts.

3 And let me just say this about the counts. If
4 you find that he's not guilty on Count 1, which is the
5 drug distribution, the money laundering, same thing.
6 You've got to find the money laundering is proceeds of an
7 illegal activity. So, if the first one is not guilty,
8 the rest are easy. I think we agree on that. They're
9 going to go one way or the other, and they're going to be
10 the same. So, let me just say that.

11 But "willfully" is defined for you. This is
12 what you must find: That the act was committed
13 voluntarily and purposely with the specific intent to do
14 something the law forbids, with bad purpose, to disobey
15 the law.

16 Doug Grover told you -- and there's a man with
17 some good experience. I mean, he's a mob fighter. He's
18 been in the trenches, and David Vogel came to him. Why
19 did he come to him? He said, "I want to know if I'm in
20 compliance with the law."

21 And he said, "You know, I looked at this and
22 we had highly paid associates and assistants look at this
23 and I told David, 'I don't see how you can be
24 prosecuted.'" That's what his lawyer told him, "I don't
25 see how you can be prosecuted based on this status of the

1 law." This wonderfully clear status of the law that you
2 have before you now, "I don't see how anyone could
3 prosecute you"; yet, here we are today.

4 The protocol. You probably have it memorized
5 by now, but Carrie Demers told you that every doctor was
6 able to tweak it. Every doctor was able to come in and
7 put their spin on it. And one of the exhibits that's
8 admitted into evidence but you haven't seen yet is
9 Exhibit No. 11, Defendant's Exhibit No. 11; and this is a
10 letter from Dr. Fabi to a prescription -- a pharmacy.
11 And he's very specific. He's coming down on this
12 pharmacy and he says, (reading) in order for a patient to
13 be approved for a refill, according to our patient
14 agreement, they must submit monthly evaluation reports
15 and agree to random drug testing. All refills are not
16 automatic under the agreed protocol unless the patient
17 meets my requirements.

18 Once again, the doctors are in control of the
19 medical situation. Every doctor has a 30-, 40-page
20 agreement that is in evidence, if you want to see them.
21 All of them are defense exhibits. And in those exhibits,
22 it's very clear the doctors are in control of the medical
23 decisions. It also is very clear the doctors are to
24 advise Madison about compliance. Compliance, compliance,
25 compliance, compliance. How many times have we heard

1 that? The doctors are to advise Madison about
2 compliance.

3 They want to say, "Oh, this is a smoke
4 screen." But dang, there's so much consultation with the
5 doctors; and the doctors have participated in the
6 protocol and signed off on the protocol so many times.
7 Dr. Edwards, Dr. Fabi.

8 Now, this is -- I'll give you -- it's a bullet
9 point. Obviously this isn't everything that happened,
10 but these doctors are signing off on it. And they say a
11 patient/physician relationship is established by these
12 things.

13 Exhibit 57. This is early when Dr. Hoblit is
14 being engaged by Madison. David is not telling him what
15 the protocol is. He says, Dr. Hoblit, send me your
16 protocols." He's asking for the doctor's input. If his
17 intent is to violate the law, he would be telling the
18 doctor, not asking the doctor.

19 Exhibit 72. This is Dr. Hoblit writing to, of
20 all people, Eric Fox and he sends him the protocol and he
21 says, "Oh, by the way, we believe we properly comply with
22 DEA guidelines for both state and federal regulations.
23 The doctors are intimately involved with this." Carrie
24 Demers herself told you the protocol is what
25 distinguished Madison from everybody else.

1 And remember about Eric Fox? We heard about
2 his little Internet pharmacy he was running. It was a
3 click-and-pop. It was a click-and-pop.

4 Now, the government brought to you some
5 patient files; and there were some mistakes in them. And
6 how did they present them to you? They presented them to
7 you through Carrie Demers. And I want to make note of
8 this. She said, "Until they showed me those files, I
9 thought they were all in order. They had to bring them
10 to me and show me the mistakes. After their two and a
11 half years of investigation, they brought them to me and
12 showed me the mistakes." She said, "I was there. I
13 didn't know there were mistakes."

14 And, so, the next question I asked her was,
15 "Well, was David there?"

16 "No, he wasn't there."

17 "Well, he couldn't have known, could he?"

18 "No, he couldn't have known about those
19 mistaken files."

20 So, the person that was on-site, the person
21 charged with responsibility did not know those mistakes
22 were there until the government brought her the files.

23 Touch on a couple of things. The DEA raids
24 the home in New Hampshire. Tina Vogel has got her script
25 written by Dr. Hoblit. And Agent Fairbanks says, "Oh,

1 yeah, go ahead. That's legitimate. Take the pills."

2 So, they're not even consistent internally with how
3 they're treating this.

4 And then there's Bonnie Brown, the curious
5 case of Bonnie Brown. Two months of marriage, 14 years
6 of divorce, and she's not bitter. She can't even
7 identify him. She points out Agent Carr here as her
8 husband. We all had a little chuckle over that. She is
9 obviously upset. She wasn't making the money. She was
10 disgruntled, she was bitter, and that's the reason she
11 wrote the letter. It's about the money. Don't kid
12 yourself. It's about the money.

13 Tyra Barnett. Tyra came to us; and she has a
14 coke issue or two, that's for sure. But what she told
15 you was most important. I asked her, "You had carte
16 blanche to call those attorneys, didn't you?"

17 "Oh, yes, I did."

18 "And you called them, didn't you?"

19 "Oh, yes, I did. In fact, Susan Henricks came
20 to the facility twice."

21 And I had it wrong. You may recall I made
22 some objection. I thought Carrie Demers said that she
23 called Susan and Susan -- it wasn't. It was Tyra. And
24 to get it right, I got the transcript, just to refresh
25 you, because I wanted to make sure I didn't confuse you,

1 and I did.

2 This is Tyra Barnett: "You had carte blanche
3 to call those lawyers whenever you wanted, right?

4 "And you told us earlier that when you talked
5 to Susan Henricks, she said what you're doing at Madison
6 is legal, right?

7 "At the time, yes.

8 "And you relied on it?

9 "Yes.

10 "And you did that in good faith, didn't you?

11 "Yes."

12 Intent. Willfulness.

13 Susan Henricks said, "You guys are compliant."
14 Compliance, compliance, compliance. Now, she wouldn't
15 put it in writing. You may have learned a little bit
16 about how lawyers act in this case. You may think now
17 lawyers, all they do is cover their own behinds. There's
18 some truth in that. Mike Cooper sure did. He had the
19 best disclaimer language I think you've seen in this
20 whole trial. But he wouldn't answer the question that
21 was asked of him. Because the question that David Vogel
22 asked him is shown in Government's Exhibit 180 and, of
23 course, the first thing I highlighted in pink is the
24 reason he came to Mike Cooper, "I want a written opinion
25 on how to do business correctly."

1 So, Mike Cooper spends gobs of money, gobs of
2 time, and comes up with an answer; but he didn't answer
3 the questions.

4 (Reading) if a patient can't get it physically
5 done on premises, can we contact a firm that does
6 insurance physicals and have a doctor or a nurse give the
7 patient a physical out of state?

8 Mike Cooper never answered that question.

9 So, he writes his April 20th letter and then
10 there's, the same day, a second letter where he tells
11 Mr. Vogel, "I can't answer your other questions."

12 And, so, the government wants to turn the fact
13 that he gave a green light to face-to-face into a red
14 light for non-face-to-face. That's not at all what he
15 did. He simply said, "I think you can do this." He
16 didn't say, "You can't do that."

17 No lawyer who's come to this courtroom has
18 told you what they were doing was illegal. They simply
19 said, "We don't know. We don't know." That was what the
20 lawyers said. That's not intent to violate the law. You
21 can't turn an "I don't know" into a "you can't."

22 Now, Tyra told you that she did call Susan and
23 Susan told her it was legal, that she relied on that; and
24 then we have the lawsuit where she says, "It's all me.
25 I'm Madison." And she put that in a lawsuit paper and

1 then they settled the lawsuit and a year later she calls
2 back and says, "Oh, David, guess what. I need work. You
3 were right. All along you were right and I was wrong and
4 would you please take me back?" And he was smart enough
5 to say no, I guess, because she did not get hired back.

6 Carrie Demers testified for you. I think
7 Carrie means compliance. When I hear Carrie, I think
8 compliance because I asked her probably 20, 25 times
9 about different emails where David is banging her,
10 banging her, banging her about "You've got to comply.
11 You've got to comply. You've got to comply."

12 And she said, "Yes, yes, he was very
13 interested in that."

14 And we have one email late in the game that
15 sort of doesn't have any context. And Carrie says, "I
16 understand not to lie or lie by omission about Madison or
17 any of its protocol"; and we didn't quite give you the
18 flavor of what prompted that email. It was Defendant's
19 Exhibit 74 where David is writing to her and he says,
20 "You cannot mislead a pharmacy. Telemedicine is
21 acceptable according to the DEA's own memo. If you hide
22 what we are doing from this pharmacy, you are sending a
23 message that what we are doing is something wrong. You
24 cannot do that. I want to be clear on this: Lying or
25 lying by omission is something that makes you look

1 sinister. Don't do it."

2 Now, do you think David Vogel is writing all
3 these emails over the course of six, five years thinking
4 that you're going to be reading them in 2010? No, he
5 didn't. He wrote this because he insists on compliance.

6 Another letter that is in evidence that we
7 didn't put before you is Defendant's Exhibit 25. This is
8 interesting because it's David telling Beverley
9 Edwards -- excuse me. It's the reverse. It's Beverley
10 Edwards telling David, "Oh, thank you for insisting that
11 letters be sent to two patients abusing the program."
12 Somehow David picked up that two patients were violating
13 the protocol. He alerted the doctor. If he was just
14 about pushing pills, he would never have done that. And
15 that is back in 2005.

16 Now, you know Carrie pled guilty. She's going
17 to do 30 days. Jonathan Vogel pled guilty to a
18 misdemeanor.

19 Now, you didn't -- like my brother said, you
20 didn't leave your common sense at the door. They did
21 that to avoid the risk of being here on this table and
22 getting years in prison. They took a sweet deal that was
23 offered to them, and that's the reason they pled guilty.

24 When Carrie was on the stand, I asked her,
25 "You were debriefed in June of 2009, last year, by all

1 the folks at this table; and what did you tell them?"

2 Now, this is seven months after the DEA had raided the
3 facility.

4 She said to her knowledge Madison operated
5 within the bounds of the law. Now, she's sitting there
6 with these folks here; and she tells them, "I thought
7 Madison was legal." And she said, "Also, if I didn't
8 understand some of the laws, I would call Dr. Venegas."

9 Three people came to you from inside the
10 clinic -- Tyra, Carrie, and Dr. Hoblit. Now, Dr. Hoblit
11 was a strange witness indeed because they called him and
12 then they wanted to call him hostile, their own witness,
13 somebody that they've got a plea agreement with that's
14 cooperating with government, met with them so many times
15 he can't even remember. And he gets up on that stand and
16 he tells you the truth and all of a sudden he's hostile
17 because -- what did he say? He said -- No. 1, he didn't
18 lose his license because of Madison. They talked about
19 writing prescripts. That was the clinic after Madison.
20 He thought what he was doing was right. "I thought what
21 we were doing was legal." He said, "I talked to
22 Dr. Bridges, and Dr. Bridges told me the same thing. I
23 thought it was legal." That's people inside the clinic,
24 a doctor, a respected doctor. Mike Millsap said he was a
25 good doctor. He called him as an expert witness. You

1 heard those patients yesterday all say, "Gosh, he was
2 kind and caring and one of the best doctors I ever talked
3 with. He spent more time with me on the phone than a
4 doctor in the office did."

5 And what else did he tell you? "I never
6 conspired with David Vogel. I never had any agreement
7 with David Vogel. I never even met David Vogel."

8 Now the experts. I suppose Dr. Nelson is
9 sitting in Salt Lake City looking out a top-floor window
10 pondering the world, looking at his diplomas. He's
11 probably got his certificate for serving as president of
12 the AMA on the wall with a spotlight on it. Because he
13 doesn't live in our world, folks. If you don't know how
14 much you're getting paid, you don't live in our world.
15 We worry about such things. He lives in a world of silk
16 stockings.

17 And Dr. Harmer, he told you, "I have 6,000
18 files."

19 I said, "Are there errors in there? Are there
20 mistakes in there?"

21 He said, "Yeah, there sure are."

22 And he even said, "You know, it looks like
23 they were trying. They don't do it the way I would do
24 it, but it looks like they were trying." Intent. Goes
25 to intent.

1 They all told you and Dr. Hoblit told you that
2 opiate therapy has a place in medicine. And I talked to
3 him about some -- the American Pain Society stuff where
4 doctors shouldn't be responsible when patients lie to
5 them and that there is an epidemic of misdiagnosis of
6 pain. They agreed with that. All the doctors told you
7 that they made medical decisions.

8 Bottom line here. Nothing was hidden. The
9 government wants to call Mr. Vogel a drug dealer, and
10 they want to call him a money launderer. I call them
11 patients; they call them customers. Big dichotomy there.

12 But it's a curious drug dealer indeed who puts
13 it all out in the open, files his returns, raises his
14 hand, sends in his protocol. No, no. And most
15 peculiarly, sends a letter to the DEA and says, "This is
16 what I'm doing. Let me know if you've got problems."

17 And the DEA says, "We can't figure it out.
18 It's going to be at least six months before we even know
19 where we are. We're too busy. We're too busy doing
20 other things. We can't answer your question."

21 So, in the end, this case is about what the
22 government can prove, without hesitation, that David
23 believed. You have his words -- compliance, compliance,
24 compliance. You have all those documents. Repetitively
25 he talked about compliance.

1 And, so, the real puzzling question for you
2 has to be: How do they pick and choose who they
3 prosecute? Why David but not Tina Vogel? She signed all
4 those checks. Why Carrie but not Tyra? Tyra wasn't even
5 told she was a target, and she was with MPC for four
6 years. Dr. Hoblit, but not Dr. Venegas, not Dr. Edwards?
7 Jonathan, but not Larry Schwartz? And most interesting
8 of all Eric Fox.

9 Agent Dunn made it sound like they were too
10 busy to knock on the door to tell Madison, "Hey, we have
11 got some issues." Not once did they visit Madison.
12 Again, they're out in the trash, picking up stuff like
13 that and doing investigations, gathering records. But
14 they did visit Eric Fox in Pennsylvania; and they said,
15 "Eric, stop it. Sign this agreement. Don't do it
16 anymore." They didn't do that over here. No, no, no.
17 But they did do it with Eric Fox. And Eric turns around,
18 goes right back to his click-and-pop, goes right back to
19 writing scripts, violating the memorandum of
20 understanding. And, yet, he's out on the street; and
21 David Vogel is sitting here before you.

22 Why didn't they enter a memorandum of
23 understanding with David Vogel?

24 It's about the money. It is about the money.

25 Days after he closes the deal on the Trump

1 condo to sell it, "Woo, here's a seizure. We got
2 \$3.7 million." Don't you think it's about the money?
3 The government thinks about the money. The agents think
4 about the money. Everybody thinks about the money.

5 And I know what they're going to say. I have
6 to sit down in a minute, and I'm not going to be able to
7 say anything more to you. They going to come up here and
8 say, "David Vogel thinks about the money, too." You know
9 he does. You know he does. And there's nothing wrong
10 with that. Nothing wrong with capitalism. But that's
11 what makes David Vogel a defendant and Eric Fox not a
12 defendant. It is the money.

13 I told you in opening that the one thing that
14 would be clear to you at the end of this case is that
15 nothing is clear. Hopefully you agree with me there.
16 It's all confused. It's all ambiguous. It's all subject
17 to interpretation. And another way to put that is it's
18 all reasonable doubt. It's all reasonable doubt.

19 Ladies and gentlemen, again, thank you very
20 much for your attention. We look forward to your
21 deliberations and verdict.

22 MS. SMITH: There is nothing wrong with
23 capitalism as long as you're not capitalizing by using
24 illegal activity and at the expense of others. I'll
25 agree with that. Nothing wrong with it. And I will

1 agree it is all about the money. It's all about the
2 money that David Vogel made and why he completely
3 disregarded his own protocol. That's what it's about.

4 You don't have to decide today whether you
5 think Eric Fox should be prosecuted or you think someone
6 else should or you think somebody got a fair deal. Your
7 job is to look at the evidence against David Vogel and
8 decide is he the one who violated the protocol, is he the
9 one who violated the law, is he the one who created
10 Madison Pain Clinic to distribute hydrocodone over the
11 Internet against the law, not in the usual medical
12 practice, not in -- not for a legitimate medical purpose.
13 That's what you have to decide.

14 And ladies and gentlemen, if the law is so
15 unclear, then why time after time after time are people
16 saying, "Oh, I'm not working with Madison Pain Clinic.
17 They're not seeing people face-to-face." Time after
18 time. Mark Sullivan, Warren Craig, pharmacists, "Oh, my
19 goodness. I went to Madison Pain Clinic. We are not
20 supplying them anymore." Why did they do that? Because
21 they weren't following the law.

22 What about PayPal? "We can't -- granted,
23 we're making \$11 million off you. We cannot fill your
24 orders anymore. We cannot take your payments anymore
25 because you are not -- you cannot prove to us that

1 patients are being seen in the clinic." Time after time
2 after time.

3 Attorneys. "You can't use my opinion
4 anymore," says Michael Cooper. "You know why? Because
5 you told me you weren't having people seen in the
6 facility when in my original opinion letter you told me
7 they were." It's not unclear. It's perfectly clear.

8 And what's also clear is that David Vogel
9 wanted to manipulate the system to get around that so
10 that he could make the money, and that's why it's all
11 about the money.

12 Ladies and gentlemen, to come in here and say,
13 "I, in good faith, was following the law," the faith has
14 to be good. It has to be honest. You can't come in here
15 and say, "Oh, I didn't know. I didn't know" and then
16 time after time after time completely ignore everyone who
17 is telling you have to have a face-to-face examination.

18 Now, defense counsel wants to come in here and
19 say, "Nobody said you had to do that." What? Everybody
20 said you had to do that. Even the attorneys who wouldn't
21 give a written legal opinion said, "You know what?
22 You'll definitely be in compliance if you have a
23 face-to-face." We all heard that over and over and over
24 again.

25 And why was that hammered? Because that's how

1 David Vogel violated the law.

2 Granted, they did more than the click-and-pop.
3 They did. We heard that. We're not contesting that.
4 But they didn't do enough. They still violated the law.
5 They did not follow the standard of care.

6 Now, if David Vogel wanted to be legal, he
7 would have. He had plenty of opportunities. Everyone
8 told him how to do it. "You need a doctor/patient
9 relationship. Patients need to be seen at the facility.
10 Your doctors have to be licensed in all 50 states. Your
11 pharmacists have to be licensed wherever the patients
12 reside, wherever they're distributing hydrocodone."

13 But we're going to ignore that. You know why?
14 You know why he wanted to ignore that? He wanted to
15 ignore that because that would slow down the sales. You
16 have the exhibits. Marketing, marketing, get more
17 customers, get more customers. What? These are people
18 who are getting hydrocodone after hydrocodone, dangerous
19 narcotics. Get more customers, get more customers so I
20 can make my \$26 million, \$8 million in my account.

21 You saw that chart. I believe it's
22 Government's Exhibit 149, the hydrocodone charts where
23 his main pharmacies, the bulk hydrocodone they were
24 getting compared to the rest of the country. That is
25 shocking. Those kind of narcotics going all over the

1 country, he didn't want that to slow down. That would
2 cut down the millions. He did not want to follow the
3 law. He could have.

4 And, so, what did he do so that he wouldn't
5 have to? He kept manipulating the system. He hired
6 employees that would listen to what he had to say. He
7 got unqualified, non-medically trained employees to be
8 his CEO to run his company that would listen to whatever
9 he said. He would tell them, "Oh, we're following the
10 protocol. Comply with the protocol." And they would
11 listen. Why? Because they were making a lot of money
12 and they didn't know. They were not medically trained.

13 Why do you think he got not-medically-trained
14 people? So they wouldn't know what you were supposed to
15 do. That's why.

16 He recruited and hired starving doctors,
17 starving, down-on-their-luck doctors, doctors who drank
18 Scotch at 9:30 in the morning, doctors who write
19 prescriptions from their hospital bed, doctors who will
20 prescribe every opiate imaginable. That's who he wanted
21 for his doctors. So, he hired those people to manipulate
22 the system so he could come in here and blame it on the
23 doctor, "Well, the doctor said it was okay." Come on.
24 He was paying the doctor, which, by the way, also is
25 another piece of advice he was given. You can't collect

1 the money. The doctor has to run the clinic. The
2 pharmacies have to take the money for the prescriptions.
3 He ignored that. Why? Because he wanted to control the
4 profits. He wanted the money. He wanted the bean count
5 checks. He wanted the dividends. That's why he sort of
6 went around that, essentially just ignored it. He was
7 involved in the corporate practice of medicine, which is
8 against the law. You heard Susan Henricks say it; you
9 heard Michael Cooper say it.

10 Now, defense counsel says nothing was hidden.
11 You have -- you can take back two exhibits that are a
12 perfect example of how David Vogel manipulated the law
13 and what was told to him to conform to what he wanted it
14 to be, what he wanted the protocol to be.

15 I'm going to ask you to look at Exhibits 205
16 and 206. Remember when we talked to Attorney Grover,
17 when David Vogel forwarded to Tyra Barnett, the employee
18 that he hired with no medical training, the notice from
19 Grover that he needed the extra pages of the Cooper
20 opinion, he omitted the language where Grover told him,
21 "I do note that Cooper says all patients shall be seen
22 for their initial consultation by a physician at the
23 facility." David Vogel took that out. He took out the
24 doctor/patient relationship.

25 Why? Because he would have to pay those

1 doctors to see all those patients. That takes time; that
2 takes money. That's what he didn't want to lose. He's
3 the one who deleted that. Something was hidden, hidden
4 by David Vogel. He didn't want his employees to know
5 that.

6 Now, the other thing that was told to you was
7 that the protocol wasn't violated. I would like you to
8 look at Government's Exhibit 156 in the jury room.
9 That's David Vogel's medical file. David Vogel violated
10 his own protocol. How do we know? Look at his medical
11 file. There's nothing in there other than lists of how
12 many hydrocodone pills he got and lists of prescriptions
13 written. There is one lab test from 2006, but you'll
14 notice that the hydrocodone that he was getting, just in
15 that file, which wasn't even the whole time Madison was
16 open, 2003 to 2007, over 15,000 hydrocodone pills. No
17 physical examination, no medical records. He violated
18 his own protocol.

19 And how else did you see he violated his
20 protocol? He wanted automatic refills. There's no
21 questionnaire in his file. There's no refill forms.
22 Every time he violated his own protocol and had his
23 employees violate his protocol for him, that's a
24 conspiracy. You can find him guilty just for that. It's
25 right in there. Nobody disputed that. That, as David

1 Vogel called it and as Doug Grover called it, is
2 Exhibit A. He came up with it. We're just using it. He
3 violated his own protocol.

4 Ladies and gentlemen, you've heard all the
5 evidence. We gladly accept the verdict. We want you to
6 use your common sense. We want you to think about this
7 seriously and examine all the evidence because it has
8 been proven to you by more than beyond a reasonable
9 doubt. David Vogel set up Madison Pain Clinic, David
10 Vogel called the shots, David Vogel paid the doctors,
11 David Vogel controlled his employees, David Vogel
12 distributed this hydrocodone, David Vogel violated his
13 own protocol, and he needs to be held accountable for it
14 and we're going to ask you to find him guilty for it.

15 Now, they told you we -- we did bring in Ray
16 Robinson, David Vogel's roommate in the jail, who said --

17 MR. SCOTT SMITH: Your Honor, object to that
18 and ask the jury be instructed to disregard.

19 THE COURT: Sustained as to the latter part of
20 that comment.

21 MR. SCOTT SMITH: Move for a mistrial at this
22 time.

23 THE COURT: Overruled.

24 MS. SMITH: Ray Robinson in jail.

25 MR. SCOTT SMITH: What? You just said it

1 again?

2 MS. SMITH: I said Ray Robinson was in jail.
3 I must have misspoke. I didn't even realize I did it,
4 your Honor. I thought I said Ray Robinson.

5 Anyway, Ray Robinson said he knew David
6 Vogel -- that what David Vogel said to him was all you
7 needed to get hydrocodone from Madison Pain Clinic was a
8 valid credit card and a computer mouse, and that's how
9 David Vogel wanted it. He wanted it that way so he could
10 make his \$26 million, so he could have his Trump Tower
11 condo, and so he could get hydrocodone whenever he wanted
12 it without being seen by a doctor. And we're going to
13 ask you to find him guilty of conspiracy to distribute
14 hydrocodone not for a legitimate medical purpose; and
15 we're going to also ask you to find him guilty of the
16 money laundering because the money derived from that
17 illegal activity is money laundering, even if you pay
18 your taxes on it.

19 So, the coin he bought with the money he
20 derived from Madison Pain Clinic, the condo he bought
21 from money he derived from the proceeds he made from
22 Madison Pain Clinic, and all of the money that went
23 through that clinic is all money laundering.

24 We're going to ask you to find him guilty of
25 all four counts.

1 THE COURT: All right. At this point you
2 should retire for your deliberations. I have the
3 original of the charge and the verdict form. You know
4 where the jury room is. The alternates need to be
5 excused down to the jury assembly room, but you need to
6 stick around because you never know. I hope the jury
7 stays resilient, but you never know.

8 You can take breaks whenever you want. Just
9 let us know when you're doing that. If you're leaving
10 the building, please tell the CS0. If you haven't
11 reached a verdict before 5:00 o'clock, you need to
12 continue to deliberate at least until 5:00 o'clock. In
13 other words, don't leave early. I think that's it.

14 (Recess, 12:07 p.m. to 4:00 p.m.)

15 (Open court, defendant and jury not present)

16 THE COURT: Okay. We have a note.

17 (Reading) Regarding the verdict of the jury
18 form, how is it filled out? Does the foreperson check,
19 like with a check mark, "guilty" or "not guilty"; or does
20 the foreperson initial the spaces?

21 MR. BUYS: I think you said, when you
22 described the verdict form, that they can use a check
23 mark or an "X" in the space.

24 THE COURT: Well, I'm going to say: You may
25 put a check mark or an "X" in the appropriate space,

1 "guilty" or "not guilty"; and then you --

2 MR. BUYS: The government is fine with that.

3 MR. SCOTT SMITH: That's --

4 THE COURT: You may place a check mark or an
5 "X" in the appropriate space for "guilty" or "not
6 guilty." Then you should place your initials on the
7 signature line -- or the foreperson signature line.

8 It says "date," and then it says "foreperson."
9 There's a signature line.

10 MR. BUYS: Right.

11 THE COURT: That's where they're supposed to
12 put the initials, on that line.

13 MR. BUYS: But it's the foreperson's initials,
14 right?

15 THE COURT: Right. You may place -- the
16 foreperson should then place -- I'll put "his/her
17 initials," but we know -- initials on the signature line
18 which states "foreperson" underneath it -- the signature
19 line indicated for the foreperson.

20 MR. BUYS: Yeah, that sounds good.

21 THE COURT: This is not good. Okay. So, I
22 said: You may place a check mark or an "X" in the
23 appropriate place for guilty or not guilty. The
24 foreperson should then place his/her initials on the
25 signature line indicated for the foreperson.

1 Is that acceptable --

2 MR. SCOTT SMITH: Seems pretty clear.

3 THE COURT: -- for everybody? All right.

4 MR. BUYS: Do we need to remind them to date
5 it?

6 THE COURT: Well, there is a space for that.
7 That wasn't part of the question.

8 MR. SCOTT SMITH: Let's challenge them and see
9 if they date it.

10 THE COURT: We'll just -- since they didn't
11 ask about the date, I'm not going to answer that.

12 Okay. I'm going to send that back, then.

13 (Recess, 4:02 p.m. to 4:18 p.m.)

14 (Open court, defendant present, jury not
15 present)

16 THE COURT: The jury has reached a verdict.
17 So, we'll go ahead and have the jury brought in.

18 Did you want to say anything before they come
19 in?

20 MR. BUYS: Nothing from the government, your
21 Honor.

22 MR. SCOTT SMITH: No, your Honor.

23 THE COURT: Okay. Let's go ahead and get
24 them.

25 (Jury enters courtroom, 4:20 p.m.)

1 THE COURT: I'm advised that the jury is ready
2 to return its verdict. And who speaks as the foreperson
3 of the jury?

4 JURY FOREPERSON: I do.

5 THE COURT: All right. Ms. Broomes, has the
6 jury unanimously agreed on its verdict?

7 JURY FOREPERSON: Yes, your Honor, we have.

8 THE COURT: All right. Could you please hand
9 the verdict form to the court security officer.

10 All right. The verdict will now be published.

11 COURTROOM DEPUTY: As to Count 1 of the first
12 superseding indictment, we, the jury, find David A. Vogel
13 guilty.

14 As to Count 2 of the first superseding
15 indictment, we, the jury, find David A. Vogel guilty.

16 As to Count 3 of the first superseding
17 indictment, we, the jury, find David A. Vogel guilty.

18 As to Count 4 of the first superseding
19 indictment, we, the jury, find David A. Vogel guilty.

20 Signed June 30, 2010, by the jury foreperson.

21 THE COURT: Is there a request to poll the
22 jury?

23 MR. SCOTT SMITH: Yes, your Honor.

24 COURTROOM DEPUTY: Juror No. 1, is the verdict
25 as published your verdict in all respects?

1 JUROR NO. 1: Yes.

2 COURTROOM DEPUTY: Juror No. 2, is the verdict
3 as published your verdict in all respects?

4 JUROR NO. 2: Yes.

5 COURTROOM DEPUTY: Juror No. 3, is the verdict
6 as published your verdict in all respects?

7 JUROR NO. 3: Yes.

8 COURTROOM DEPUTY: Juror No. 4, is the verdict
9 as published your verdict in all respects?

10 JUROR NO. 4: Yes.

11 COURTROOM DEPUTY: Juror No. 5, is the verdict
12 as published your verdict in all respects?

13 JUROR NO. 5: Yes.

14 COURTROOM DEPUTY: Juror No. 6, is the verdict
15 as published your verdict in all respects?

16 JUROR NO. 6: Yes.

17 COURTROOM DEPUTY: Juror No. 7, is the verdict
18 as published your verdict in all respects?

19 JUROR NO. 7: Yes.

20 COURTROOM DEPUTY: Juror No. 8, is the verdict
21 as published your verdict in all respects?

22 JUROR NO. 8: Yes.

23 COURTROOM DEPUTY: Juror No. 9, is the verdict
24 as published your verdict in all respects?

25 JUROR NO. 9: Yes.

1 COURTROOM DEPUTY: Juror No. 10, is the
2 verdict as published your verdict in all respects?

3 JUROR NO. 10: Yes.

4 COURTROOM DEPUTY: Juror No. 11, is the
5 verdict as published your verdict in all respects?

6 JUROR NO. 11: Yes.

7 COURTROOM DEPUTY: Juror No. 12, is the
8 verdict as published your verdict in all respects?

9 JUROR NO. 12: Yes.

10 THE COURT: All right. The verdict is
11 confirmed and accepted. The court administrator will
12 file and record the verdict.

13 There is another set of questions, however,
14 that the jury must answer. So, if you would retire to
15 the jury room, we'll get that ready for you; and there
16 will be another charge for you to consider.

17 (Jury exits courtroom, 4:23 p.m.)

18 THE COURT: All right. We'll make copies of
19 the supplemental instructions. You've already been given
20 a copy. But at this point, are there any objections to
21 the court's supplemental instructions?

22 MR. BUYS: Your Honor, I believe that the
23 parties have gone over that yesterday; and the government
24 has no objection to the supplemental instructions.

25 MR. SCOTT SMITH: We don't have any either,

1 your Honor.

2 THE COURT: All right. We'll make copies for
3 the jury, and everybody can read along with me when I
4 read it.

5 Now, I take it you're not going to introduce
6 any additional evidence. Is that true?

7 MR. COLLINS: Your Honor, we have one
8 demonstrative, to the extent that that would help the
9 jury. It's been marked as Government's Exhibit 210; and
10 it simply summarizes the bank accounts, the source of the
11 proceeds, and the amounts seized.

12 THE COURT: Has that already been --

13 MR. COLLINS: No, ma'am. We created it last
14 night.

15 THE COURT: Okay. For the forfeiture?

16 MR. COLLINS: And I can provide a copy to
17 defense counsel. He's not seen it yet.

18 THE COURT: All right. If you'd do that.

19 Is defense -- are you going to have any other
20 evidence?

21 MR. SCOTT SMITH: No, ma'am.

22 THE COURT: All right. But there will be
23 argument. How much time do you want for argument?

24 MR. COLLINS: Five minutes.

25 MR. SCOTT SMITH: That will be more than

1 ample.

2 THE COURT: Five minutes. All right. So, you
3 will have five minutes.

4 Okay. Let me see your little chart.

5 All right. Have you had a chance to look at
6 this?

7 MR. SCOTT SMITH: Co-counsel is going to
8 handle this part, your Honor. I'll let him speak.

9 THE COURT: All right.

10 MR. BRETT SMITH: Your Honor, my only thought
11 is it's redundant of what's already in the charge. I
12 think the information that's in the charge is reflective
13 enough for the jury to reach a proper decision.

14 THE COURT: But the charge isn't evidence.
15 This is a demonstrative aid. I don't -- I think it's
16 good to have it in one spot, on one piece of paper
17 instead of many pieces of paper. I'm going to allow it.
18 I don't see that there's anything -- if there's anything
19 inaccurate about it, please let me know. I don't want it
20 in if there's a problem, an inaccuracy. But if it's
21 accurate as to what's been admitted into evidence, I'm
22 going to allow it.

23 MR. BRETT SMITH: I don't know if the numbers
24 are accurate, but I don't have any dispute that they are
25 or are not. That's not what I'm...

1 THE COURT: All right. Well, I think it's an
2 apt summary chart that would assist the jury in reaching
3 its decision. I think it should be used.

4 MR. COLLINS: Thank you, your Honor.

5 THE COURT: All right. We'll go make copies;
6 and as soon as they're made, then we'll get the jury
7 back.

8 (Recess, 4:27 p.m. to 4:50 p.m.)

9 (Open court, defendant and jury present)

10 THE COURT: All right. These are the court's
11 supplemental instructions to the jury.

12 Members of the jury, in view of your verdict
13 that the defendant is guilty of the drug and money
14 laundering offenses charged in Counts 1, 2, 3, and 4 of
15 the first superseding indictment, you have one more task
16 to perform before you are discharged. I now must ask you
17 to render a special verdict concerning whether certain
18 property is subject to forfeiture. "Forfeiture" means
19 that the defendant loses any ownership interest he has or
20 claims to have in the property as a part of the penalty
21 for engaging in criminal activity.

22 Under federal law, any person who is convicted
23 of drug conspiracy shall forfeit to the United States any
24 property constituting or derived from proceeds the person
25 obtained directly or indirectly as a result of the drug

1 conspiracy and any of the person's property used or
2 intended to be used in any manner or part to commit or to
3 facilitate the commission of the drug conspiracy.

4 Similarly, federal law provides that any
5 person who is convicted of money laundering or money
6 laundering conspiracy shall forfeit to the United States
7 any property involved in each of those offenses and all
8 right, title, and interest in any and all property
9 traceable to such property involved in each of those
10 offenses.

11 You must now consider what verdict to render
12 on the question of whether there is a nexus -- that is, a
13 connection -- between the property that the government
14 seeks to forfeit and the drug and money laundering crimes
15 of which you have already found the defendant guilty. In
16 other words, you must find whether that property is
17 connected to the underlying crimes in the way the law
18 provides.

19 I instruct you, however, that your previous
20 finding that the defendant is guilty of the drug and
21 money laundering violations is final, conclusive, and
22 binding. Because you are bound by your previous finding
23 that the defendant is guilty, I direct you not to discuss
24 in your forfeiture deliberations whether the defendant is
25 guilty or not guilty of any drug or money laundering

1 violation.

2 All of my previous instructions regarding
3 direct and circumstantial evidence, credibility of
4 witnesses, and duty to deliberate apply with respect to
5 your verdict regarding forfeiture.

6 Government's burden of proof regarding
7 forfeiture. However, my previous instructions to you on
8 the government's burden of proof regarding your verdict
9 on the guilt of the defendant do not apply to your
10 deliberations and verdict regarding forfeiture. In
11 deliberating and deciding your verdict regarding
12 forfeiture, I instruct you that the government need only
13 prove by a preponderance of the evidence that the
14 property it seeks to forfeit constitutes or is derived
15 from proceeds of the drug and money laundering violations
16 of which you have found the defendant guilty. The
17 government is not required to prove this beyond a
18 reasonable doubt.

19 "Preponderance of the evidence" means that
20 something is more likely true than not true. Thus, the
21 government has to produce evidence which, considered in
22 light of all of the facts, leads you to believe that it
23 is more likely true than not true that the property at
24 issue is subject to forfeiture. The government need only
25 prove property is subject to forfeiture based on the

1 property's connection to either the drug violation or the
2 money laundering violations, not both. Thus, the
3 government meets its burden by proving by a preponderance
4 of the evidence that the property it seeks to forfeit
5 constitutes or is derived from proceeds the person
6 obtained directly or indirectly as a result of the drug
7 conspiracy of which you have convicted the defendant or
8 that the property was used in any manner or intended to
9 be used to commit or facilitate the drug conspiracy.
10 Alternatively, the government can meet its burden by
11 proving by a preponderance of the evidence that the
12 property it seeks to forfeit was involved in or is
13 traceable to property involved in the money laundering
14 offenses of which the defendant has been found guilty.

15 The particular properties alleged to be
16 forfeitable to the United States are as follows:

17 \$3,756,920.61 found in David A. Vogel's First
18 Republic Bank Account No. 3755;

19 \$384,669.25 found in David A. Vogel's Chase
20 Investment Services Account No. 7634;

21 \$160,211.49 found in The Hamilton Agency LP's
22 Washington Mutual Bank Account No. 8996;

23 \$27,785.65 found in Tina Vogel's First
24 Republic Bank Account No. 7395;

25 \$24,814.13 found in Tina Vogel's TD Bank North

1 Account No. 2097; and

2 \$22,070.26 found in David A. Vogel's First
3 Republic Bank Account No. 6959.

4 Consideration of trial evidence as well as
5 additional evidence. While deliberating, you may
6 consider any evidence, including testimony, offered by
7 the parties at any time during the trial.

8 Money judgment. As explained above, under
9 federal law, any person who is convicted of a drug
10 conspiracy is required to forfeit to the United States
11 any property constituting or derived from proceeds
12 obtained directly or indirectly as a result of the drug
13 conspiracy and property used or intended to be used in
14 any manner to commit or to facilitate the commission of
15 the drug conspiracy. Any person convicted of money
16 laundering or money laundering conspiracy is required to
17 forfeit to the United States any property involved in
18 those crimes or traceable to such property.

19 The government is entitled to a personal money
20 judgment against the defendant for an amount equal to the
21 value of all money and property that is subject to
22 forfeiture. The government is seeking a money judgment
23 for \$24,743,000 in this case. It is your duty to
24 determine whether it is more likely than not that this
25 amount constitutes or is derived from proceeds of the

1 drug crime or was used to commit or facilitate that crime
2 or, alternatively, that it is more likely than not that
3 this amount is property involved in the money laundering
4 offenses or traceable to property involved in those
5 crimes.

6 Definition of "proceeds." As you have been
7 instructed, under federal law, any person who is
8 convicted of drug conspiracy is required to forfeit to
9 the United States any property constituting or derived
10 from proceeds obtained directly or indirectly as a result
11 of the drug conspiracy violation. I instruct you that,
12 in this context, the term "proceeds" means property of
13 any kind obtained directly or indirectly as a result of
14 the commission of the offense giving rise to the
15 forfeiture, and any property traceable thereto, and is
16 not limited to the net gain or profit realized from the
17 offense. Property constitutes proceeds of the drug
18 conspiracy violation if the property actually is the
19 proceeds of the violation.

20 Definition of "property involved in." As you
21 have been instructed, under federal law, any person who
22 is convicted of money laundering or money laundering
23 conspiracy is required to forfeit to the United States
24 any property involved in any of those offenses and all
25 right, title, and interest in any and all property

1 traceable to such property involved in any of those
2 offenses. I instruct you that in this context the term
3 "property involved in" includes all money or property
4 laundered, any commissions and fees paid to the money
5 launderer, and any property or money used to facilitate
6 the money laundering offenses.

7 Duty not to consider certain issues that the
8 court will decide. What happens to any property that is
9 declared forfeited is exclusively a matter for the court
10 to decide. You should not consider what might happen to
11 the property in determining whether the property is
12 subject to forfeiture. In this connection, you should
13 disregard any possible claims that other persons may have
14 to the property. The interest that other persons have in
15 the property will be taken into account by the court at a
16 later time. Similarly, any claims that the forfeiture of
17 the property would constitute excessive punishment will
18 be taken into account by the court at a later time.

19 Similarly, you are not to consider whether the
20 property is presently available. That matter also will
21 be considered solely by the court in imposing sentence.

22 Your sole concern now is to determine whether
23 the property charged for forfeiture is connected to the
24 crimes of which you have found the defendant guilty as
25 described above.

1 Special verdict form. The special verdict
2 form lists the property that the government asserts is
3 forfeitable. As to each item listed, you must determine
4 whether it is connected to the drug or money laundering
5 violations for which the defendant was convicted
6 according to the instructions given above.

7 You may answer by simply putting an "X" or
8 check mark in the space provided next to the words "yes"
9 or "no." If you answer "no," there will be a follow-up
10 question that you must answer. The foreperson must then
11 date and sign the special verdict form with his or her
12 initials.

13 Unanimous verdict. You must reach a unanimous
14 verdict as to each question on the special verdict form.
15 Everyone must agree to any "yes" or "no" answer and to
16 any amount you enter on the special verdict form.

17 Signed in Beaumont, Texas, this 30th day of
18 June, 2010, Marcia A. Crone, United States District
19 Judge.

20 Turning to the special verdict form.

21 We, the jury, having found the defendant
22 guilty of Counts 1, 2, 3, and 4 of the first superseding
23 indictment make the following findings:

24 A, Specific Property.

25 1, we, the jury, unanimously find by a

1 preponderance of the evidence that the \$3,756,920.61
2 found in David A. Vogel's First Republic Bank Account
3 No. 3755 is:

4 (a) property constituting or derived from
5 proceeds obtained directly or indirectly as a result of
6 the drug conspiracy charged in Count 1 of the first
7 superseding indictment or was used or intended to be used
8 in any manner to commit or to facilitate the commission
9 of that violation; and/or

10 (b) property involved in the money laundering
11 or money laundering conspiracy violations charged in
12 Counts 2 through 4 of the first superseding indictment or
13 is traceable to such property.

14 Yes or no.

15 If you answer "no," state the amount of these
16 funds, if any, that is subject to forfeiture.

17 Amount, dollar sign, blank.

18 2, we, the jury, unanimously find by a
19 preponderance of the evidence that the \$384,669.25 found
20 in David A. Vogel's Chase Investment Services Account
21 No. 7634 is:

22 (a) property constituting or derived from
23 proceeds obtained directly or indirectly as a result of
24 the drug conspiracy charged in Count 1 of the first
25 superseding indictment or was used or intended to be used

1 in any manner to commit or to facilitate the commission
2 of that violation; and/or

3 (b) property involved in the money laundering
4 or money laundering conspiracy violations charged in
5 Counts 2 through 4 of the first superseding indictment or
6 is traceable to such property.

7 Yes or no.

8 If you answer "no," state the amount of these
9 funds, if any, that is subject to forfeiture.

10 Amount, dollar sign, blank.

11 3, we, the jury, unanimously find by a
12 preponderance of the evidence that \$160,211.49 found in
13 The Hamilton Agency LP's Washington Mutual Bank Account
14 No. 8996 is:

15 (a) property constituting or derived from
16 proceeds obtained directly or indirectly as a result of
17 the drug conspiracy charged in Count 1 of the first
18 superseding indictment or was used or intended to be used
19 in any manner to commit or to facilitate the commission
20 of that violation; and/or

21 (b) property involved in the money laundering
22 or money laundering conspiracy violations charged in
23 Counts 2 through 4 of the first superseding indictment or
24 is traceable to such property.

25 Yes or no.

1 If you answer "no," state the amount of these
2 funds, if any, that is subject to forfeiture.

3 Amount, dollar sign, blank.

4 4, we, the jury, unanimously find by a
5 preponderance of the evidence that the \$27,785.65 found
6 in Tina Vogel's First Republic Bank Account No. 7395 is:

7 (a) property constituting or derived from
8 proceeds obtained directly or indirectly as a result of
9 the drug conspiracy charged in Count 1 of the first
10 superseding indictment or was used or intended to be used
11 in any manner to commit or to facilitate the commission
12 of that violation; and/or

13 (b) property involved in the money laundering
14 or money laundering conspiracy violations charged in
15 Counts 2 through 4 of the first superseding indictment or
16 is traceable to such property.

17 Yes or no.

18 If you answer "no," state the amount of these
19 funds, if any, that is subject to forfeiture.

20 Amount, dollar sign, blank.

21 5, we, the jury, unanimously find by a
22 preponderance of the evidence that the 24,814.13 found in
23 Tina Vogel's TD Bank North Account No. 2097 is:

24 (a) property constituting or derived from
25 proceeds obtained directly or indirectly as a result of

1 the drug conspiracy charged in Count 1 of the first
2 superseding indictment or was used or intended to be used
3 in any manner to commit or to facilitate the commission
4 of that violation; and/or

5 (b) property involved in the money laundering
6 or money laundering conspiracy violations charged in
7 Counts 2 through 4 of the first superseding indictment or
8 is traceable to such property.

9 Yes or no.

10 If you answer "no," state the amount of these
11 funds, if any, that is subject to forfeiture.

12 Amount, dollar sign, blank line.

13 6, we, the jury, unanimously find by a
14 preponderance of the evidence that the \$22,070.26 found
15 in David A. Vogel's First Republic Bank Account No. 6959
16 is:

17 (a) property constituting or derived from
18 proceeds obtained directly or indirectly as a result of
19 the drug conspiracy charged in Count 1 of the first
20 superseding indictment or was used or intended to be used
21 in any manner to commit or to facilitate the commission
22 of that violation; and/or

23 (b) property involved in the money laundering
24 or money laundering conspiracy violations charged in
25 Counts 2 through 4 of the first superseding indictment or

1 is traceable to such property.

2 Yes or no.

3 If you answer "no," state the amounts of these
4 funds, if any, that is subject to forfeiture.

5 Amount, dollar sign, blank line.

6 B, money judgment.

7 We, the jury, unanimously find by a
8 preponderance of the evidence that \$24,743,000 is the
9 amount equal to the money and value of the property that
10 is subject to forfeiture.

11 Yes or no.

12 If you answer "no," state the amount of money,
13 if any, you find is equal to the money and value of the
14 property that is subject to forfeiture.

15 Amount, dollar sign, blank line.

16 And then lines for the date and foreperson's
17 initials.

18 And at this time we'll have additional
19 argument.

20 MR. COLLINS: Thank you, your Honor.

21 May it please the court, ladies and gentlemen
22 of the jury. I just want to address the asset forfeiture
23 portion of today's proceedings. We've prepared a
24 demonstrative to help you with this. I think if you have
25 your special verdict form out, you can follow along with

1 the demonstrative. This will make sense.

2 This is a different burden imposed on the
3 government. This is a preponderance of the evidence.
4 Think about a scale, 51 percent versus 49 percent. If
5 the government's 51 percent right, you can mark "yes" on
6 your special verdict form with respect to each of these
7 counts.

8 Your Honor, may we at this time publish
9 Government's Exhibit 210, a demonstrative to help the
10 jury understand the asset forfeiture proceedings?

11 THE COURT: Yes.

12 MR. COLLINS: Now, recall that Special Agent
13 Dana Bracy took the stand and testified about all the
14 accounts, all the financial information. If you have
15 your special verdict form in front of you, the first
16 question, Question No. 1, relates to the first account,
17 which is I believe the First Republic Bank account.
18 There's an exhibit in evidence about this account. This
19 is the account numbers you see on your special verdict
20 form. This is the amount of money that was seized from
21 the account; and this is one of the questions in front of
22 you, is this the appropriate amount of money to be seized
23 from this account. The government's position is it is
24 because David Alan Vogel received royalty checks, bean
25 count checks, K-1 dividend checks, and deposited those

1 checks into this First Republic account. These checks
2 came from the Madison Pain Clinic. They are proceeds
3 that came from the illegal operation of a drug
4 distribution program, and they went into this account.

5 He also used the funds in this account to
6 purchase a Trump Tower condominium. You recall the
7 evidence. We went through all the down payments and
8 where that money came from with Special Agent Bracy.
9 That was money that came out of the Madison Pain Clinic.
10 So, that was tainted funds that went into this account.

11 He sold the account [sic] and had \$4 million
12 at one point in the account; and the government seized
13 it, 3.7 million.

14 With respect to your special verdict form, if
15 you can follow the flow and say that tainted money went
16 into this account because it came from Madison Pain
17 Clinic's operations, running an illegal drug distribution
18 program, then the government is entitled to seize that
19 money because it's tainted funds. And on your special
20 verdict form, if you look on first Question No. 1, if you
21 can answer "yes," then that's it. You don't have to go
22 any further. You don't have to come up with a dollar
23 figure.

24 So, at this point the government has
25 illustrated through the testimony from Special Agent

1 Bracy that royalty checks, bean checks, and deposits from
2 Madison Pain Clinic went into that First Republic account
3 and then he used that First Republic account to cash his
4 check from his condo.

5 With respect to the second account, Chase
6 Investment Services, there's an exhibit in evidence that
7 talks about this account. It's Account No. 7634. This
8 particular account received transfers from two other
9 Chase accounts, and we walked through this during the
10 course of the trial.

11 Special Agent Bracy demonstrated that Chase
12 Accounts 5965 and 765 [sic] received tainted money from
13 the sale of drugs. That went into those two accounts.
14 And from those two accounts, Mr. Vogel transferred that
15 money into this account, this 7634; and this is the total
16 amount that he transferred. The government seized this
17 amount (indicating).

18 So, just like a moment ago, if you follow the
19 logic of the money, tainted money went into an account,
20 that tainted money was transferred into this account, and
21 the government seized that money. That's tainted money
22 that comes from the sale -- the illegal sale and
23 distribution of hydrocodone.

24 So, on your special verdict form, this is
25 Question No. 2, the \$384,000. And if you can follow that

1 flow and understand that tainted money from the sale of
2 drugs went into that account and then the government
3 seized that money, that's Question No. 2. And, again,
4 it's just a preponderance of the evidence standard.

5 The third account is this Washington Mutual
6 account, this 8996 account. Everybody remembers that
7 account. That is one of the two Madison Pain Clinic
8 operating accounts. That's deposits that were made into
9 that account from the sale of hydrocodone, the sale of
10 drugs over the Internet; and at one point over \$9 million
11 went into that account. The government -- when it seized
12 that account, it was able to seize \$160,000.

13 So, again preponderance of the evidence. If
14 it's more likely than not that tainted money is in that
15 account, then that can be seized. And, again, on your
16 special verdict form, you just answer "yes." You don't
17 have to come up with the amount number.

18 With respect to the First Republic Bank
19 account, Bank Account No. 7395, again, salary and
20 dividend checks went into that First Republic Bank
21 account. \$317,000 worth, we were able to trace it. And
22 from that amount, 27,000 was in the account on the day
23 that the government seized the account. They were
24 spending the money; but there was \$27,000 in there.

25 So, again, tainted money from the sale of

1 drugs goes into an account. The government seized that
2 account. As long as it's more likely than not that that
3 money came from Madison Pain Clinic sales of drugs over
4 the Internet, then the government is entitled to seize
5 that money.

6 The same is true with the TD Bank North
7 account. Again, salary and dividend checks from the
8 Madison Pain Clinic went into that account; and at the
9 day of seizure, there was 24,000.

10 And, also, with First Republic Bank, over
11 \$2 and a half million went into that account through
12 salary, royalty checks, and bean checks. \$22,000 was
13 left, and that's the amount that was seized.

14 Just to be clear, Madison Pain Clinic ran an
15 operation that was the illegal sale of drugs. They got
16 money for that. They put that money into bank accounts.
17 When you put illegal funds into a bank account, that's an
18 illegal act; and it's subject to forfeiture. And that's
19 your job today with the special verdict form, is just to
20 say that the money that the government seized in those
21 accounts was in fact subject to forfeiture.

22 Now, there's one more question on the special
23 verdict form on the last page with respect to money
24 judgment. You heard Special Agent Bracy give you a
25 number. It was \$26 million, \$26 million worth of

1 deposits. \$26 million flowed into this organization.
2 The government is seeking a personal money judgment
3 against Mr. Vogel for 24,743,000 of those dollars. We
4 were conservative. We gave him a couple of allowances;
5 and we've come up with a conservative figure of
6 \$24,743,000.

7 And just to remind you of the evidence that
8 you saw when Dana Bracy was on the stand, remember he had
9 dozens and dozens of boxes of those two Washington Mutual
10 accounts that had every check, every deposit, every wire
11 transfer and he went through every single one of those
12 and he figured out where the money went. Sometimes the
13 money went to pharmacists and sometimes the money went to
14 advertisers and doctors, but most of the money went to
15 David Vogel and Tina Vogel. And he was able to see the
16 payments from those Washington Mutual accounts and how
17 they flowed into Mr. Vogel and Mrs. Vogel's accounts, and
18 that's what this part of the trial is about.

19 If you look on that special verdict form and
20 you can see that tainted money moved from Madison Pain
21 Clinic into one of their accounts, then that's money
22 subject to forfeiture.

23 Thank you.

24 MR. BRETT SMITH: Just briefly, ladies and
25 gentlemen.

1 Based on your verdict, the only thing I would
2 point out to you, on paragraph B, the money judgment, I
3 think you'll recall the testimony of Dana Bracy, that all
4 the money was paid through the IRS. There were tax
5 returns filed by The Hamilton Agency. David Vogel filed
6 taxes. In fact, his testimony was David Vogel made
7 approximately \$8.5 million personally; and he was
8 probably in a 50 percent tax bracket, which would knock
9 that number down by at least 50 percent.

10 The government has got everything. They're
11 going to get everything. You're probably going to say
12 "yes" to all the other questions and forfeit it, but a
13 money judgment against David Vogel in the amount of
14 \$24 million is a bit excessive. I don't think it follows
15 the evidence even by a preponderance.

16 THE COURT: Anything further?

17 MR. COLLINS: No, your Honor.

18 THE COURT: All right. Well, at this time
19 we'll send you back with the special verdict instructions
20 and form. Again, the bond paper is the official one.

21 (Recess, 5:13 p.m. to 6:11 p.m.)

22 (Open court, defendant present, jury not
23 present)

24 THE COURT: Okay. I have a note. It says:
25 Chase Investment Services Account 7634, we cannot find an

1 exhibit regarding that account. What is the exhibit
2 number?

3 They have a list of the exhibits. There's
4 nothing that's exactly described that way. The
5 demonstrative thing shows that it's 153D003, but 153 on
6 this list just says "Summary Schedules of MPC Transfer
7 Payments to Various Accounts."

8 MR. COLLINS: Yes, your Honor. There's
9 153b -- 153 is composed of, I think, five different
10 subparts -- A, B, C, D, and E. So, they have to do some
11 digging to find that. They've got to go to 153b and then
12 to page 3 to see it. It's a long *Excel* spreadsheet.

13 THE COURT: Well...

14 MR. COLLINS: It's there. It's just -- and
15 it's small, I think. I mean, they probably may need a
16 magnifying glass. At one point we had a copy of the
17 exhibits in the room.

18 THE COURT: Right. This is -- the exhibit
19 list went back. It's just you can't tell.

20 MR. COLLINS: Right. I'm speaking about the
21 actual exhibit itself. 153 --

22 THE COURT: Well, I'm sure they have it.

23 COURTROOM DEPUTY: They have it.

24 THE COURT: So, what do you want me to tell
25 them?

1 MR. COLLINS: They need to look into 153, find
2 the page at the bottom that has the letter B, and then
3 find page 3 from that sequence. It's a thick spreadsheet
4 and they're going to have to do some digging to get to
5 that point, but we gave them the page reference, 153b --

6 THE COURT: The demonstrative gives it, but
7 they don't have this. Do you understand they don't have
8 this, this demonstrative?

9 MR. COLLINS: Oh. Then I think the answer to
10 the jury's question, your Honor, is: See Exhibit
11 153b-003.

12 MR. SCOTT SMITH: I think the answer is "You
13 have all the evidence before you." I don't think we can
14 comment and direct them to a specific --

15 THE COURT: That's the problem.

16 MR. COLLINS: Okay.

17 THE COURT: "You have all the evidence before
18 you." It is there.

19 MS. SMITH: Yeah. I mean, I think you can say
20 it's Exhibit 153, as it says on the evidence list; but I
21 don't think we can specify where in Exhibit 153.

22 THE COURT: No. Well, I usually don't tell
23 them; but, you know, federal courts can comment on the
24 evidence. So, I could just say "Please refer to Exhibit
25 153" but nothing more than that.

1 MR. COLLINS: Okay.

2 MR. SCOTT SMITH: Please note our exception
3 for the record, please.

4 THE COURT: And note it's after 6:00 o'clock.
5 I don't want to sit here while they dig through all these
6 things, because it's there.

7 MR. SCOTT SMITH: I understand that.

8 THE COURT: It's not a matter of, oh, it's not
9 there and they would never find it. It is there.

10 Is the government concerned about directing
11 them to exhibit --

12 MR. COLLINS: No, your Honor. I mean,
13 Exhibit 153 is in the record. Exhibit 153b is labeled.
14 They just need to go to the exhibit.

15 THE COURT: "Please refer to Exhibit 153."
16 Okay. That's what's going to happen.

17 (Recess, 6:15 p.m. to 6:38 p.m.)

18 (Open court, defendant and jury present)

19 THE COURT: All right. Ms. Broomes, has the
20 jury unanimously agreed on its verdict?

21 JURY FOREPERSON: Yes, ma'am, we have.

22 THE COURT: Okay. Would you please hand that
23 to the court security officer.

24 JURY FOREPERSON: (Complies)

25 THE COURT: All right. I will publish the

1 verdict.

2 It reads: We, the jury, having found the
3 defendant guilty of Counts 1, 2, 3, and 4 of the first
4 superseding indictment, make the following findings:

5 Specific property.

6 We, the jury, unanimously find by a
7 preponderance of the evidence that the \$3,756,920.61
8 found in David A. Vogel's First Republic Bank Account
9 No. 3755 is:

10 (a) property constituting or derived from
11 proceeds obtained directly or indirectly as a result of
12 the drug conspiracy charged in Count 1 of the first
13 superseding indictment or was used or intended to be used
14 in any manner to commit or to facilitate the commission
15 of that violation; and/or

16 (b) property involved in the money laundering
17 or money laundering conspiracy violations charged in
18 Counts 2 through 4 of the first superseding indictment or
19 is traceable to such property.

20 "Yes."

21 No. 2, we, the jury, unanimously find by a
22 preponderance of the evidence that the \$384,669.25 found
23 in David A. Vogel's Chase Investment Services Account
24 No. 7634 is:

25 (a) property constituting or derived from

1 proceeds obtained directly or indirectly as a result of
2 the drug conspiracy charged in Count 1 of the first
3 superseding indictment or was used or intended to be used
4 in any manner to commit or to facilitate the commission
5 of that violation; and/or

6 (b) property involved in the money laundering
7 or money laundering conspiracy violations charged in
8 Counts 2 through 4 of the first superseding indictment or
9 is traceable to such property.

10 "Yes."

11 3, we, the jury, unanimously find by a
12 preponderance of the evidence that the \$160,211.49 found
13 in The Hamilton Agency LP's Washington Mutual Bank
14 Account No. 8996 is:

15 (a) property constituting or derived from
16 proceeds obtained directly or indirectly as a result of
17 the drug conspiracy charged in Count 1 of the first
18 superseding indictment or was used or intended to be used
19 in any manner to commit or to facilitate the commission
20 of that violation; and/or

21 (b) property involved in the money laundering
22 or money laundering conspiracy violations charged in
23 Counts 2 through 4 of the first superseding indictment or
24 is traceable to such property.

25 "Yes."

1 4, we, the jury, unanimously find by a
2 preponderance of the evidence that the \$27,785.65 found
3 in Tina Vogel's First Republic Bank Account No. 7395 is:

4 (a) property constituting or derived from
5 proceeds obtained directly or indirectly as a result of
6 the drug conspiracy charged in Count 1 of the first
7 superseding indictment or was used or intended to be used
8 in any manner to commit or to facilitate the commission
9 of that violation; and/or

10 (b) property involved in the money laundering
11 or money laundering conspiracy violations charged in
12 Counts 2 through 4 of the first superseding indictment or
13 is traceable to such property.

14 "Yes."

15 5, we, the jury, unanimously find by a
16 preponderance of the evidence that the \$24,814.13 found
17 in Tina Vogel's TD Bank North Account No. 2097 is:

18 (a) property constituting or derived from
19 proceeds obtained directly or indirectly as a result of
20 the drug conspiracy charged in Count 1 of the first
21 superseding indictment or was used or intended to be used
22 in any manner to commit or to facilitate the commission
23 of that violation; and/or

24 (b) property involved in the money laundering
25 or money laundering conspiracy violations charged in

1 Counts 2 through 4 of the first superseding indictment or
2 is traceable to such property.

3 "Yes."

4 6, we, the jury, unanimously find by a
5 preponderance of the evidence that the \$22,070.26 found
6 in David A. Vogel's First Republic Bank Account No. 6959
7 is:

8 (a) property constituting or derived from
9 proceeds obtained directly or indirectly as a result of
10 the drug conspiracy charged in Count 1 of the first
11 superseding indictment or was used or intended to be used
12 in any manner to commit or to facilitate the commission
13 of that violation; and/or

14 (b) property involved in the money laundering
15 or money laundering conspiracy violations charged in
16 Counts 2 through 4 of the first superseding indictment or
17 is traceable to such property.

18 "Yes."

19 B, money judgment.

20 We, the jury, unanimously find by a
21 preponderance of the evidence that \$24,743,000 is the
22 amount equal to the money and value of the property that
23 is subject to forfeiture.

24 "Yes."

25 Dated 6/30/10, signed with the initials of the

1 foreperson.

2 All right. Is there a request to poll the
3 jury?

4 MR. SCOTT SMITH: No.

5 THE COURT: All right. The verdict is
6 confirmed and accepted, and the court administrator will
7 file and record the verdict.

8 If the jury would just return to the jury room
9 briefly, you will be discharged and you will be given
10 certificates, et cetera. And you will be free to discuss
11 the case with anyone you wish and you may speak with the
12 lawyers and the media, but you're not obligated to do so.
13 And, of course, you will be paid for each day of jury
14 service.

15 So, if you would just return briefly to the
16 jury room, I will come and talk to you in a minute.

17 (Jury exits courtroom, 6:43 p.m.)

18 THE COURT: All right. A written presentence
19 report will be prepared by the probation office to assist
20 the court in sentencing. And, Mr. Vogel, you will be
21 asked to give information for the report; and your
22 attorney may be present if you wish. You and your
23 counsel will review and fully discuss the presentence
24 report before the sentencing hearing, and you may make
25 any objections that you deem necessary. You and your

1 attorney will have an opportunity to address the court at
2 the sentencing hearing.

3 The defendant is referred to the probation
4 office for a presentence investigation and report.

5 And defendant is remanded to the custody of
6 the United States Marshal and, pending preparation of the
7 presentence report, will be again delivered to this court
8 for purposes of sentencing.

9 All right. Now, I'm going to go talk to the
10 jury briefly. Usually I let the jury talk to the
11 lawyers; but in view of the hour, 20 till 7:00, they
12 probably don't want to stick around and talk to you. So,
13 I was just going to thank them for their service. I
14 mean, I can ask them, if you want to talk to them.

15 MR. SCOTT SMITH: I would just like to say
16 "thank you." If they want to.

17 THE COURT: Okay.

18 MR. BUYS: Judge, if they're willing to talk
19 to us, we always want to talk to them.

20 THE COURT: Yeah, you always want to talk to
21 them.

22 MR. BUYS: Yeah, yeah.

23 THE COURT: Okay. I just think they're not
24 going to be real thrilled to stay.

25 MR. BUYS: Yeah. Our feelings won't be hurt

1 if they want to get out of here.

2 THE COURT: Okay. I will go talk to them.

3 (Proceedings concluded, 6:45 p.m.)

4

5 COURT REPORTER'S CERTIFICATION

6 I HEREBY CERTIFY THAT ON THIS DATE, MARCH 7TH,
7 2011, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
8 RECORD OF PROCEEDINGS.

9

10 /s/ Tonya Jackson
11 TONYA JACKSON, RPR-CRR

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